Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-406

THE ESTATE OF NOLVERT P. SCOTT, JR.,
Individually and on behalf of all
other persons similarly situated,
Petitioner,

v.

THE UNIVERSITY OF DELAWARE, *et al.*
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, The Estate of Nolvert P. Scott, Jr., individually and on behalf of the class it represents, prays that a writ of certiorari issue to review and reverse the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 6, 1979.

OPINIONS BELOW.

The opinion of the United States District court for the District of Delaware by The Honorable Walter K.

Stapleton certifying the class is reported at 68 F.R.D. 606 (D.Del. Sept. 11, 1975) (Appendix A). The opinion on the motion to decertify the class is unreported officially, but may be found at 16 F.E.P. Cases 737 (D.Del. Sept. 14, 1976) (Appendix B). The decision of the United States District Court on the merits is reported at 455 F.Supp. 1102 (D.Del. Aug. 16, 1978) (Appendix C).

The opinion of the United States Court of Appeals for the Third Circuit is not yet reported officially, but may be found at 19 F.E.P. Cases 1730 (3d Cir. June 6, 1979)(Appendix D). The judgment in the United States Court of Appeals for the Third Circuit was entered on June 6, 1979. (Appendix I) A petition for a rehearing was denied on July 3, 1979. (Appendix J)

JURISDICTION.

The petition for a rehearing was denied on July 3, 1979. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Has the court of appeals misconstrued Dr. Scott's burden in its finding that he failed to make out a prima facie case of intentional race discrimination?

2. Was the propriety of the class certification properly before the court of appeals in view of the fact that the University did not take a cross-appeal and did not raise the issue of class certification until the time of the filing of its answering brief?

3. Does a non-renewed university sociology professor have such an inherent conflict with a class of faculty members which includes prospective applicants that the certification of such a class constitutes an abuse of discretion?

STATUTES AND RULES INVOLVED.

This case involved Rules 4(a) and 10(b) of the Federal Rules of Appellate Procedure and Rule 23 of the Federal Rules of Civil Procedure.

It also involves 28 U.S.C. §2106 and 42 U.S.C.§§1981, 1983 and 2000e et seq. The above-stated rules and statutes are found in Appendix K.

STATEMENT.

On September 11, 1975, the District Court certified this suit as a class action. (Appendix F) Jurisdiction was based on 28 U.S.C. §1343. The court found that the plaintiff, who was allegedly a victim of discriminatory working conditions and contract termination, was "seeking to represent all blacks who have been or in the future will be, discriminated against with respect to a number of employment practices." (A4) After the University had essentially completed its discovery, it filed a motion to decertify the class. At that time the deposition of Nolvert Scott had been taken and the plaintiff had answered a substantial set of interrogatories. (Docket Entries, Ct. of Appeals Appendix 3-5a). The court on September 16, 1976, refused to decertify the class. (Appendix G). Trial began on April 4, 1977.

Dr. Scott's Individual Claim

University regulations require that a professor whose contract is up for renewal be judged using the general criteria of scholarship, teaching, and service. Each department also is required to weight each of these criteria and to specify in writing the types of evidence that will be used in the evaluation of each of the three general criteria. The members of a department vote on the renewals and their recommendation is sent to the administration. Toward the end of the second year of petitioner's three-year contract, in

May of 1973, he was non-renewed because his performance in teaching and scholarship allegedly was substandard. Dr. Scott continued working until June, 1974.

The evidence is undisputed that the renewal vote of the sociology department violated University and departmental regulations. Scholarship, teaching and service were not weighted. (In fact, little credit was given Dr. Scott for service). Furthermore, student evaluations, not designated as evidence for evaluating "teaching", were used to Dr. Scott's detriment. (Testimony of Chairman Scarpitti, Ct. of Appeals Appendix, 502-504a) The record also reflects that he was the first black hired in the sociology department and this was only after prodding by the University president. He then was the first person ever non-renewed by that department. Dr. Scott was referred to as "window dressing" by one of the members of the department. He additionally was the subject of racial hate mail by students and he was falsely accused of and investigated for public drunkenness on campus, yet no administrative action was taken to determine who his accusers were or to reprimand them.

Drs. Alfred McClung Lee and James Blackwell, experts in higher education, testified that the evaluation of Dr. Scott was unreliable. Dr. Lee also said that Dr. Scott was a qualified teacher. Dr. Magoon, the faculty moderator of the student government's teacher evaluations, recounted that the student evaluations were unreliable and that Scott's teaching was found adequate by him in a controlled study which he performed.

The performance of Dr. Scott was compared to that of Drs. Nohara, of the sociology department, who was renewed in 1970; Kepka of the educational foundations department, who was renewed in 1973 and 1974; Black of the English department, who was renewed in 1971 and 1973; and Reddington, who was renewed in 1969. The performance of all these professors was comparable to or worse than Dr. Scott.

It was admitted by the sociology department chairman that Nohara in 1970 was judged inadequate in teaching, scholarship, and research. The district court acknowledged that Black, Reddington and Kepka "were given significantly greater opportunities for re-evaluation" and were renewed despite comparable or poorer performance records than Dr. Scott.

Dr. Scott also relied in his prima facie case upon a wealth of evidence showing the University's historical and present mistreatment of blacks (See pp 5-6, *infra)* (For a complete record with transcript references for all the above see pp 21-30 of the Brief of Appellant in the court of appeals).

The district court held that Dr. Scott had not established a "prima facie case." (A74) It minimized or ignored most of the evidence and ruled that Dr. Scott was not *comparable* to Nohara because he was *hired* in 1965 when scholarship was not emphasized. It also ruled that Reddington, Kepka and Black were "simply different" because they were from different University departments. The court of appeals concurred and held that Scott had not made out a *prima facie* case. (A75)

The Class Claim

In support of plaintiff's class-wide prima class facie case, there was introduced into the record evidence demonstrating that the University's employment practices excluded blacks by law until 1950. The record reflects that even after *Parker v. University of Delaware,* 75 A.2d 225 (Del.Ch. 1950), when then Vice Chancellor Seitz held that the University of Delaware was discriminating in admissions against black students, and *Brown v. Board of Education,* 347 U.S. 483 (1954), the University in 1965 still had no black faculty members or administrators and only a handful of black students on campus. Even as late as 1971, there were only .6% blacks on the faculty. At the time of

trial, there were 1.47% blacks as faculty (12 out of 818), 3.3% as undergraduates and 1.8% as graduate students. Of 65 part-time faculty, there were no blacks in 1976.

The record identifies 55 black applicants since 1972. At least 11 of them were rejected, allegedly because they lacked certain degree requirements. Of the 100 hires immediately before trial, only one or two were black. Plaintiff also introduced expert testimony and documentary evidence of how the hiring process tended to perpetuate the almost all-white faculty.

Non-statistical expert testimony by Drs. Blackwell and Lee demonstrated how poorly the University of Delaware has done in eradicating race discrimination when compared to eighteen other states. As compared to the ten states found to discriminate against blacks in higher education in *Adams v. Richardson*, 356 F.Supp. 92 aff'd and modified, 480 F.2d 1159 (D.C.Cir. 1973) (en banc), the University of Delaware compared poorly in the number of black faculty members on the staff, last in the number of tenured faculty, and last in the number of graduate students (For a complete record with transcript references, see pp 2-21 of the Brief of Appellant in the court of appeals).

Despite all this evidence the district court held that plaintiff had not demonstrated prima facie evidence of intentional (§1983) or non-purposeful (§1981) race discrimination. The court then held that even though plaintiff had made out a case of race discrimination pursuant to 42 U.S.C. §2000e, defendants had rebutted the prima facie showing.

An appeal was taken by the plaintiff and he identified the issues on appeal pursuant to Rule 10(b) of the Federal Rules of Appellate Procedure. The question of the class certification was not an issue identified by either party. Furthermore, defendants did not cross-appeal. The defendants did urge in their answering brief on appeal that the judgment below should be affirmed "because the class

should never have been certified." At oral argument in the court of appeals the question of class certification was raised. However, the court, upon realizing there had been no cross-appeal, discontinued questioning concerning the propriety of the class. The majority opinion of the court of appeals held that the issue of whether or not the class certification was proper or not could be entertained even though there was no cross-appeal and that in its opinion there had been an abuse of discretion in certifying the class. The court stated that Nolvert Scott's interests were "necessarily in conflict with those of applicants for positions on the University faculty" because he held a "Doctor of Philosophy degree when he assumed his position" and he received a premium over the salary normally paid by the University to new Ph.D's. Dr. Scott had taught for eight years prior to receiving his Ph.D in 1971. The court also stated that Dr. Scott conceded he was not discriminated against in hiring.

Dr. Scott was only qualified to teach in sociology, one of 41 departments in the University. Since there were only ten members in the department and there is no evidence that it was planning to hire anyone, except to replace Dr. Scott, any conflict he would have with potential University applicants would have to be *de minimus*. Dr. Scott disagrees with the finding of the court of appeals that he does not "claim that he was discriminated against by the University's hiring policies." (A83) Testimony was introduced that he was considered "window dressing." Furthermore, he has complained throughout that he was only considered a token black. Although Dr. Scott himself was hired, he never conceded that he suffered no ill effects from the discriminatory hiring policies at the University. Dr. Scott also objects to the finding of the court of appeals that he asserted the Ph.D in his own favor in seeking relief on his individual disparate treatment claim. There is no record support for this conclusion.

The court of appeals decision created for the first time two subclasses, a subclass of faculty applicants and a second subclass of faculty employees. The court concluded that Nolvert Scott was not an adequate representative of the applicant class and that there was insufficient numerosity for the faculty subclass. Judge Adams concurred with the judgment of the court in a separate opinion stating that (1) a cross-appeal should never be necessary in this kind of case and (2) in his view the court is not retrenching from *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975) cert. denied 421 U.S. 1011 (1975). The court then remanded the case to the district court with "instructions that an order be entered decertifying the class action claims." (A89)

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals Has Applied an Erroneous Standard of Proof for Establishing a Prima Facie Case in the Context of a Higher Education Suit.

This court has attempted to ennunciate the kind of evidence necessary to establish prima facie intentional race discrimination. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, (1978); *Board of Trustees v. Sweeney*, U.S. , 58 L.Ed.2d 216 (1978). There has never been any suggestion that a prima facie case is limited to a certain schema. In fact, in *McDonnell Douglas Corp. v. Green, supra*, at 802, ftn. 13, a hiring case, this court specifically held that there could be models of discrimination other than that suggested in *Green*. In the instant case, where Dr. Scott was terminated by the failure of the University to renew his contract, the court of appeals limited itself to the *McDonnell Douglas Corp. v. Green*

model and held that there was no prima facie showing of race discrimination.

Dr. Scott demonstrated in support of his prima facie showing that: (1) he is black, (2) he was non-renewed despite his qualifications (see *McDonnell Douglas Corp. v. Green, supra.)*, (3) he was the subject of overt racial slurs made to him by faculty and students, (4) there were procedural irregularities in the handling of his renewal (see *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267 (1977)), (5) the voting process was subjective with an opportunity to discriminate (see *Castaneda v. Partida*, 430 U.S. 482, 497 (1977)), (6) there is a history of race discrimination at the University (see *Castaneda v. Partida, supra*, at 495, *Furnco Construction Corp. v. Waters, supra*, at 580, *Teamsters v. United States*, 431 U.S. 324, 339 (1977)), and (7) as compared to one faculty member in his department and three other members in similar departments, he was disciplined more severely than other similarly-situated non-blacks (see *McDonald v. Santa Fe Trail Transp. Co., supra.* at 283, ftn. 11). Considering "the totality of the relevant facts", *Washington v. Davis*, 426 U.S. 229, 242 (1976) the court of appeals misconstrued the prima facie burden of Dr. Scott. He at least made out such a case. The opinion below then is in conflict with all this Court's cases dealing with the extent and kind of evidence necessary to show prima facie race discrimination. For this reason the petition should be granted.

II. The Opinion of the Court of Appeals for the Third Circuit Allowing the Review of the Class Certification Without a Cross-Appeal Is in Direct Conflict with *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1976).

In *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479 (1976), this court confirmed the "inveterate and certain" rule of *Morley Construction Co. v. Maryland Casualty*

Co., 300 U.S. 185, 191 (1937), that a cross-appeal must be taken by the appellee when he wishes to lessen the rights of his adversary, but a cross-appeal need not be taken when he merely wishes to urge other reasons for the affirmation of the judgment below. The court in *Massachusetts Mut. Life Ins. Co.* was applying this rule to the appellate practice of the Seventh Circuit. The court, in quoting from *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924) said:

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below . . ."

This authority was brought to the attention of the Third Circuit in appellant's reply brief, but it was ignored by the court of appeals. For the Third Circuit to decertify the class, *sua sponte*,[1] without a cross appeal, was not only erroneous, but contrary to settled law.

There is also a long line of cases standing for the proposition that the Supreme Court will not entertain an issue not appealed from. See *Dandridge v. Williams*, 397 U.S. 471, 475-76 n. 6 (1970); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4 (1970); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1975); *Swarb v. Lennox*, 405 U.S.

1 The University in its brief argued that the class should not have been certified, but only so in support of its argument to affirm the decision of the district court. It did not request that the class be decertified.

191, 201 (1972). In the concurring opinion by Judge Adams in this case, he acknowledged that the practice of the Third Circuit is in variance with that of the Supreme Court (A92) n. 9). This practice is squarely in conflict with the clearly enunciated doctrine of this Court and for this reason the petition should be granted.

III. There Now Exists a Split Among the Circuits With Respect to When a Cross-Appeal is Necessary and This Court Should Resolve the Conflict.

The Scott decision is in direct conflict with *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 88, ftn. 2 (8th Cir. 1976). In that case the court of appeals held that an appellee cannot challenge a class certification of a truth-in-lending claim when it did not file a cross-appeal.

> "Defendant Boston Securities seeks to challenge on appeal the district court's certification of the suits as class actions on the question of liability. We need not reach this question, however, for Boston has not filed a cross-appeal. An Appellee cannot attack a judgment either to enlarge his rights thereunder or to lessen the rights of his adversary unless he files a cross-appeal. *Tiedman v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 513 F.2d 1267, 1272 (8th Cir. 1975); *Hadfield v. Ryan Equip. Co.*, 456 F.2d 1218, 1222 (8th Cir. 1972)."

A careful examination of the circuit opinions throughout the country makes it apparent that there is no uniformity among circuit courts of appeal as to when a cross-appeal is necessary and when it is not necessary. The D. C. Circuit in *Gomez v. Wilson*, 477 F.2d 411, 414 n. 10 (D.C.Cir. 1973) stated that "unappealed portions of a district court order are final" and therefore the court of appeals is "without jurisdiction to reconsider them." This decision, however, is inconsistent with *Arnold's Hofbrau, Inc. v. George Hyman*

Construction Co., Inc., 480 F.2d 1145, 1150 (D.C.Cir. 1973) which says that a cross-appeal is not jurisdictional. The Second Circuit, in *Securities And Exchange Commission v. Fifth Avenue Coach Lines, Inc.*, 435 F.2d 510, 516 (2nd Cir. 1970), an opinion written by Judge Adams sitting by designation from the Third Circuit, has held that "since the SEC did not cross-appeal from Judge McLean's order, our power is limited by the doctrine expressed by Justice Cardoso's opinion in *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185 (1937)." *Morley Construction Co.* held that a court of appeals has no right to review a lower court's decision when there is no cross-appeal. The First Circuit in *Ortega Cabrera v. Municipality of Bayamon*, 562 F.2d 91, 97, n. 3 (1st Cir. 1977), stated that "it is elementary that failure to file a notice of appeal precludes an appellee from attacking the judgment." The Fifth Circuit in *Chouinard v. Chouinard*, 568 F.2d 430 (5th Cir. 1978), stated that an appellee who wishes to secure an alteration or modification of judgment must cross-appeal. However, in *United States v. United States Steel Corporation*, 520 F.2d 1043, 1052 (5th Cir. 1975), cert. denied 429 U.S. 817 (1976), it held that under special circumstances a court of appeals may consider an issue even though there is no cross-appeal. The Eighth Circuit which, as a rule, refuses to consider changes of a judgment order where there has been no cross-appeal, *Joseph v. Norman's Health Club, Inc., supra.*, did, however, in *Chicago, Burlington & Quincy Railroad Company v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1268, n. 5 (8th Cir. 1973), alter a judgment in favor of appellee without a cross-appeal where at oral argument it appeared that both counsel had made an arithmatical error which became the basis of the judgment below.

There is also a line of cases, to which the Third Circuit adheres, which states that the requirement of a cross-appeal is merely a "rule of practice" which may be

disregarded in the interest of justice. *Tug Raven v. Trexler*, 419 F.2d 536, 548 (4th Cir. 1969) cert. denied 398 U.S. 938 (1970).

In short, the courts of appeals have not enunciated a consistent policy with respect to the necessity of cross appeals. This case raises the issue squarely of when a cross-appeal is necessary.

IV. The Decision of the Court of Appeals Raises the Important Federal Question of Whether *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), Has Inherently Overruled All Those Circuit and Supreme Court Decisions Which Have Permitted a Discharged Employee to Represent Prospective Employees in a Class Action Suit.

In the instant case Nolvert Scott sought to represent a class of black faculty members, present, past and future, at the University of Delaware who had been discriminated against on the basis of race. It appeared prior to the decision of the circuit court that *Wetzel v. Liberty Mutual Insurance Company*, 508 F.2d 239 (3rd Cir. 1975), cert. denied 421 U.S. 1011 (1975), was controlling and that a district court judge had the discretion to certify a class in such a case. The court of appeals, however, distinguished *Wetzel* relying upon *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), and held that there was such a necessary conflict between a discharged faculty member and the prospective applicants of the class that it would be an abuse of discretion for a trial court to certify such a class. The rationale for distinguishing this case from *Wetzel v. Liberty Mutual* is explained in footnote 21 (A84).

> "In that case, Liberty Mutual objected to class certification on the ground that the *former employees*, 'who have voluntarily severed their employment prior to suit cannot adequately represent members of the

class who are *presently employed* by the company.' 508 F.2d at 247. (emphasis supplied). Liberty Mutual never raised, and the court apparently never considered, the issue of whether *current employees* can represent a class of *prospective employees*. Certainly the interests of the former employees in Wetzel, who had voluntarily left their employment, would not be adversely affected by potential competition from prospective employees. Scott, in contrast, would have been in sharp competition for contract renewal and tenure with applicants who might be offered faculty positions."

The court went on to say "it is doubtful after *East Texas Motor Freight* that he (Scott) can lead a class challenging hiring practices." (A86).

This is also exactly what the Fourth Circuit said in *Hill v. Western Electric Company, Inc.*, 596 F.2d 99 (4th Cir. 1979). There the court held that *East Texas Motor Freight v. Rodriguez* limits *Barnett v. W.T. Grant Company*, 518 F.2d 543 (4th Cir. 1975), which had previously held a discharged employee could represent a class including potential hires. In *Hill* the district court certified a class of blacks who were discriminated against in hiring, job assignment and promotions. Named plaintiffs were six black males and females who had all been employed by Western Electric. In light of *Rodriguez* the court of appeals held that the named plaintiffs were not adequate representatives of the class because their jobs were "so different in kind from that of people who were denied any employment that the plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring." *Id.*, at 102.

The state of the law is that pre-*East Texas* decisions, such as *Johnson v. Georgia Highway Express, Inc.*, 417

F.2d 1122 (5th Cir. 1969) and *Franks v. Bowman*,[2] 424 U.S. 747 (1976), appear to allow a former employee to represent a class which includes prospective employees, while post-*East Texas* decisions do not.

It is now unclear whether or not *East Texas v. Rodriguez* has implicitly overruled *Franks*. That question should be resolved by this court.

2 In *Franks v. Bowman*, this court affirmed the judgment on behalf of a class where the intervenor, Mr. Lee, a discharged employee, was permitted to represent a class of prospective and present employees.

V. CONCLUSION

For the foregoing reasons, this court should grant the petition for certiorari to review the judgment of the Third Circuit.

Respectfully submitted,

BADER, DORSEY & KRESHTOOL

By:
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Dated: September , 1979

AFFIDAVIT OF MAILING

STATE OF DELAWARE

COUNTY OF NEW CASTLE SS.

BE IT REMEMBERED that on this day of September, 1979, before me, the Subscriber, a Notary Public for the State and County aforesaid, personally appeared , who, being duly sworn according to law, did depose and say that she mailed today, by regular mail, postage prepaid, three copies of the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, and APPENDIX, to the following attorneys:

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SWORN TO AND SUBSCRIBED before me the day and year aforesaid.

Notary Public

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

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APPENDIX

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APPENDIX A.

Nolvert P. SCOTT, Jr., Individually and
on behalf of all others similarly
situated, Plaintiff,

v.

The UNIVERSITY OF DELAWARE
et al., Defendants.
Civ. A. No. 74-58.

United States District Court,
D. Delaware.
Sept. 11, 1975.

Sheldon N. Sandler, and Thomas S. Neuberger, of Bader, Dorsey & Kreshtool, Wilmington, Del., for plaintiff.

John P. Sinclair, of Potter, Anderson & Corroon, Wilmington, Del., for defendants.

MEMORANDUM OPINION

STAPLETON, *District Judge:*

Plaintiff, on behalf of himself and others similarly situated, brings this civil rights[1] action to redress the allegedly discriminatory employment practices at the University of Delaware. Plaintiff is a black sociology professor whose three-year teaching contract with the defendant University was not renewed, and he seeks injunctive relief from the University's allegedly discriminatory practices in hiring, firing, recruitment, promotion, supervision, wages, terms, conditions, and privileges of faculty employment. He also seeks reinstatement, promotion, and compensatory and punitive damages.[2]

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1. Plaintiff's claim is based on Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) 42 U.S.C §§ 1981 and 1983 and on the Thirteenth and Fourteenth Amendments.

2. A more complete statement of facts is found at 385 F.Supp. 937 (D.Del.1974).

The complaint alleges that the University has a history of discrimination against blacks; that it was ordered desegregated in 1950; that it hired its first black faculty member in 1965; and that today it has only one black tenured faculty member. The complaint also relates a series of incidents wherein the plaintiff was allegedly the victim of racial discrimination, e. g., his assignment on short notice of unfamiliar subjects as his teaching load; discriminatory denial of department clerical staff assistance for outside activites, and the termination of his unemployment. Further, plaintiff alleges that the discrimination to which he has been subjected is typical of the discrimination suffered by the class he seeks to represent.

Presently before the Court are two motions: (1) a motion by the plaintiff for certification of this action as a class action and (2) a motion by defendants to strike from the action its class aspects. Since consideration of plaintiff's motion requires consideration of the issues raised by defendants' motion, the two motions are considered simultaneously.

Rule 23(c), Fed.R.Civ.P. requires that "As soon as practicable after the commencement of an action brought as a class action, the Court shall determine by order whether it is to be so maintained." For it to qualify as a class action, the Court must find that the action is being brought by a class member and that it meets the four enumerated prerequisites of Rule 23(a).[3] It must also find that the action is properly maintainable under one of the three subdivisions of Rule 23(b). Since the plaintiff is only contending that the action is proper under the 23(b)(2)

3. Rule 23(a), Fed.R.Civ.P. is as follows:

(a) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable. (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

subdivision,[4] the other subdivisions of 23(b) need not be addressed.

Defendants initially challenge whether plaintiff is a member of the described class as required by Rule 23(a). Defendants assert that plaintiff was discriminated against neither in recruitment nor in hiring, and that, accordingly, he may not represent a class composed of those who were.

In Title VII cases, the courts have consistently held that one who has been a victim of a discriminatory employment practice at a particular institution may bring a class action on behalf of others who have allegedly been victims of the same or other types of discriminatory employment practices at the institution. In *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969), where a discharged black employee sought to bring a Title VII class action on behalf of those blacks harmed by alleged discrimination in hiring, firing, promotion, and maintenance of facilities, the Fifth Circuit reversed a lower court holding that had narrowed that class to only those blacks who had been fired. Similarly, in *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir., 1975), the court found reversible error in the narrowing of a Title VII class action to only those specific actions taken by the defendant against the representative plaintiff. The assumption behind these cases is that one who has suffered discrimination in the course of his employment is "a person aggrieved, . . . [who] . . . can represent other victims of the same policies, whether or not all have experienced discrimination in the same way." *Long v. Sapp*, 502

4. Rule 23(b)(2), Fed.R.Civ.P. is as follows:

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or . . .

F.2d 34, 43 (5th Cir. 1974).[5] Accordingly, the Court finds in the instant action that the plaintiff, allegedly a victim of racially discriminatory working conditions and contract termination, is a proper party to bring a class action on behalf of a class which includes blacks who allegedly have been or will be discriminated against in recruitment and hiring.[6]

The numerosity, commonality, and typicality requirements of (a)(1), (a)(2), and (a)(3) respectively, are usually not barriers to Title VII class actions since the discrimination which the suit seeks to end is per se based on class characteristics. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). Defendants, however, raise two issues relating the the (a)(1), (a)(2), and (a)(3) prerequisites. First, defendants contend that plaintiff is the only black faculty member who has ever been terminated by the University. Accordingly, defendants argue that plaintiff is the sole member of the class of blacks who could allege discrimination with respect to termination and that the numerosity requirement has, accordingly, not been met. Plaintiff, however, is seeking to represent all blacks who have been, or in the future will be, discriminated against with respect to a number of employment practices, Inasmuch as his complaint alleges that discriminatory employment practices are continuing, the class plaintiff represents properly includes those who may in the future face the alleged discrimination. *Kohn v. Royall,*

5. The cases relied upon by the University are distinguishable. *E. g., Black Coalition v. Portland School District No. 1,* 484 F.2d 1040 (9th Cir. 1973) (students who wish to challenge a number of school disciplinary regulations on procedural due process and vagueness grounds have standing to attack only those regulations pursuant to which they themselves have been disciplined and cannot represent a class composed of persons who have been disciplined under other regulations); and *Palmer v. Thompson,* 391 F.2d 324 (5th Cir. 1967) (unincarcerated blacks who have not been subjected to discriminatory practices at allegedly segregated jail cannot bring class action attacking such practices on behalf of inmates).

6. Closely related to this question of whether a particular plaintiff is a member of the class he purports to represent is the question of whether the plaintiff is in a position to provide proper representation. See note 7, *infra,* and accompanying text.

Koegel & Wells, 59 F.R.D. 515 (S.D.N.Y.1973), *appeal dismissed,* 496 F.2d 1094 (2nd Cir. 1974). This class is incapable of specific enumeration and it has been held in similar circumstances that, for this reason alone, joinder is "impractical" within the meaning of Rule 23(a)(1). *Jack v. American Linen Supply Co.,* 498 F.2d 122, 124 (5th Cir. 1974) (per curiam). this case need not turn on that ground alone, however. If we assume the existence of continuing racial discrimination by the University in recruitment and hiring, as I believe we must for present purposes, the class is not limited to black faculty members who are or have been actually employed by the University, and it appears more likely than not that the entire group of past, present and future victims of the alleged discriminatory employment practices, while not precisely determinable, would be of sufficient size to make "joinder of all members impracticable". Under these circumstances, I consider the appropriate course to certify the case as a class action; if facts subsequently developed cast doubt on whether the numerosity requirement is met, the matter may be reexamined.

Next, defendants contend that plaintiff cannot bring a class action on behalf of blacks who allegedly suffered discrimination by reason of terms and conditions of employment, because his situation is an individual matter which is not representative of black employees in general, and which, therfore, must be decided on its own merits. In essense, defendants' position is that defendants do not practice racial discrimination and, therefore, a class action challenging such discrimination is not proper. These contentions by defendants must be rejected. Class action determinations may not be based on a preliminary evaluation on the merits. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177, 94 S.CT. 2140, 40 L.Ed.2d 732 (1974). Plaintiff has alleged certain past racial discriminatin by defendants and certain recent incidents which are alledged to have resulted from an attitude of racial bias on the part of the University's administration. If defendants' conduct is now in full compliance with the applicable laws, a finding to that effect must

await a later stage of this proceeding. Accordingly, the Court finds that the requirements of (a)(1), (a)(2), and (a)(3) have been met.

Regarding requirement (a)(4), the Court at present has no reason to believe that plaintiff will not fairly and adequately protect the interests of the class. Plaintiff's conduct of this litigation to date has fully comported with this standard, and the Court, therefore, finds that, for the present, this requirement has been met.[7]

The requirements of (b)(2) are particularly suited to civil rights cases. See *Advisory Committee Note to Proposed Amendment to Rule 23*, 39 F.R.D. 69, 102 (1966). The relief here sought is proper under (b)(2);[8] and, for the reasons expressed *supra* with respect to (a)(1), (a)(2), and (a)(3), this Court finds that this class action is maintainable under (b)(2).

For the foregoing reasons, this Court holds that plaintiff is entitled to have this action certified as a class action.

Submit order.

7. In (b)(2) actions wherein absent and unnotified class members may be bound and wherein a plaintiff is complaining of racially motivated actions that do not affect him directly, a court must remain vigilant to see that such absent members are properly represented. See *Barnett v. W. T. Grant Co., supra*. 518 F.2d at 547, n. 4. The present class action certification can be reviewed hereafter in light of development in the case. Rule 23(c)(1).

8. See *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d, 239, 251 (3rd Cir. 1975).

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NOLVERT P. SCOTT, JR., individually
and on behalf of all other persons similarly situated,

Plaintiff,

v.

THE UNIVERSITY OF DELAWARE,
et al.,

Defendants.

Civil Action No. 74-58

Sheldon N. Sandler, Esquire, and Thomas S. Neuberger, Esquire, of Bader, Dorsey and Kreshtool, Wilmington, Delaware. Attorneys for Plaintiff.

John P. Sinclair, Esquire, of Potter, Anderson & Corroon, Wilmington, Delaware. Attorney for Defendants.

OPINION

Wilmington, Delaware
September 14, 1976

STAPLETON, *District Judge*.

Defendant has filed a motion to decertify this action as a class action. In its opening brief, defendant argued that plaintiff's answers to interrogatories indicated that plaintiff could not identify any black faculty members discriminated against by the University of Delaware in recruitment, hiring, firing, promotion, supervision, wages, or in terms, conditions and privileges of employment, nor could plaintiff state how any black faculty member was discriminated against in these respects. In light of

this, defendant maintained, the action should be dismissed as a class action.

Plaintiff responded that he was prepared to present a *prima facie* case of discrimination through (1) statistical evidence of disparity between the percentage of blacks on the faculty at the University of Delaware and the percentage of blacks in the over-all population, and (2) evidence of racial slurs against plaintiff and a statement by one of the faculty members who voted for his dismissal that plaintiff was simply "window dressing" at the University.

Since the opening briefs were filed, plaintiff has filed supplemental answers to interrogatories. Those answers include, *inter alia*, (1) a statistical analysis by Dr. Bernard Siskin purporting to show the percentage of blacks available in the Ph.D. labor force, (2) identifications of individuals not hired by the Univesity allegedly because of racial discrimination and individual blacks currently employed by the University and allegedly discriminated against, and (3) plaintiff's contention about how defendant has discriminated against blacks, including his contentions that the University refuses to be competitive with other universities in terms of the salaries it offers; that black employees are not promoted because they are evaluated more critically than their white colleagues; and that blacks are required to complete their Ph.D.'s before they are hired while whites are not subject to the same requirements. In addition, plaintiff, in his answers, describes particular instances of allegedly disparate treatment of blacks by the University which plaintiff contends constitute racial discrimination.

Defendant argues that statistical analysis comparing the percentage of blacks employed with the percentage of blacks in the over-all population is not sufficient to constitute a *prima facie* case of discrimination in that the relevant labor market which should be used is not the over-all black population, but rather that pool of blacks who are qualified to teach at the University. Defendant further disputes the accuracy of plaintiff's supplemental answers, denies that the acts relied on by plaintiff

as evidence of racial discrimination in fact constitute discrimination under the terms of Title VII, and contends that plaintiff relies at most on discrete acts of discrimination against separate individuals, which makes this inappropriate for class action treatment, both because of lack of numerosity and because of lack of commonality in the interests of plaintiff and the other potential members of the class.

Although I doubt that statistical comparison of blacks employed at the University to blacks in the over-all population, without more, would be sufficient to constitute a *prima facie* case of racial discrimination,* I need not address that question here since plaintiff's answers to interrogatories include both statistical analysis comparing blacks employed by defendant to the pool of black Ph.D.'s as well as additional instances of alleged discrimination against plaintiff, other black employees and potential employees of the University. This is not to say that I am deciding at this point either the accuracy of the supplemental answers to interrogatories or whether the acts referred to in those interrogatories will prove to constitute racial discrimination under the terms of Title VII. Indeed, it would be inappropriate to decide such questions at this point. As noted below, class determinations should not be based on preliminary evaluation of the merits of the complaint.

Defendant's contention that this is simply a case of individual discrimination and that therefore class action certification is not appropriate for failure to meet the Rule 23(a) prerequisites of numerosity, commonality, and typicality, was addressed in my opinion of last year. As I explained there, plaintiff alleges a continuing pattern and practice of employment discrimination at the University, and seeks to represent all blacks, past, present and future who have been or will be discriminated against in various phases of employment process. As such, joinder of all members is impractical within the meaning of Rule 23(a)(1) both because

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**United States v. Hazelwood School District*, 11 E.P.D. paragraph 10,854 (8th Cir. 1976), (in particular see footnote 5); *James v. Stockham Valves and Fitting Company*, 394 F.Supp. 433 at 496 (N.D. Ala. 1975).

specific enumeration of members of the class is impossible and because even if specific enumeration were possible, the number of past, present and future victims of the discrimination would be of sufficient size to make that joinder impracticable.

I further noted in my earlier opinion that defendant's contention that class action certification is not appropriate because the named plaintiff's situation is an individual matter and not representative of the situation is an individual matter and not representative of the situation of black employees in general, assumes what is yet to be determined on the merits and must, therefor, be rejected. As I said in that opinion:

> In essence, defendant's position is that defendants do not practice racial discrimination and, therefore, a class action challenging such discrimination is not proper. These contentions by defendants must be rejected. Class action determinations may not be based on a preliminary evaluation on the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Plaintiff has alleged certain past racial discrimination by defendants and certain recent incidents which are alleged to have resulted from an attitude of racial bias on the part of the University's administration. If defendants' conduct is now in full compliance with the applicable laws, a finding to that effect must await a later stage of this proceeding. 68 F.R.D. at 609.

Nothing defendant asserts in its argument to the Court now changes my analysis. Defendant's contentions that it does not discriminate cannot be dtermined at the class action certification stage; it must await a decision on the merits. The motion to decertify the class is denied.

APPENDIX C.

Nolvert P. SCOTT, Jr., Individually and on behalf of all other persons similarly situated,

Plaintiff,

v.

The UNIVERSITY OF DELAWARE et al.,

Defendants.

Civ. A. No. 74-58.

United States District Court, D. Delaware.

Aug. 16, 1978.

John S. Grady and Thomas S. Neuberger of Bader, Dorsey & Kreshtool, Wilmington, Del., for Plaintiff.

John P. Sinclair of Potter, Anderson & Corroon, Wilmington, Del., for Defendants.

Marilyn S. G. Urwitz, EEOC, Washington, D.C., amicus curiae.

OPINION

STAPLETON, *District Judge:*

Dr. Nolvert P. Scott, Jr. ("Scott") brough this class action against the University of Delaware ("the University"), its Board of Trustees, and other University officials and faculty members, alleging racial discrimination in the hiring, discharge, recruitment, promotion, supervision, wages, terms, conditions and privileges of employment of its faculty. Scott seeks a declaratory judgment, reinstatement and damages on his own behalf, and injunctive relief on behalf of the class which he

represents. In an Opinion dated November 20, 1974,[1] this Court held that the complaint stated a claim under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*, as well as under 42 U.S.C. §§ 1981 and 1983. In an Opinion dated September 11, 1975,[2] this Court certified the action as a class action on behalf of all blacks who have been or in the future will be , discriminated against on the basis of race with respect to the above enumerated employment practices. On September 14, 1976, this Court denied the defendants' motion to decertify the class. After a four week trial, the case is now ready for final disposition. This Opinion constitutes the Court's findings of fact and conclusions of law.

I. Background Facts.

A. *Historic Background.*

While Delaware College, the predecessor of the University, was founded as a private institution, there has been significant state involvement with it since 1867 when it was designated by the General Assembly as the State of Delaware's land grant college. The details of the State's subsequent and increased involvement in the affairs of the University are set forth in a stipulation admitted into evidence at trial.[3] It will suffice for present purposes to find that the State's involvement is, and for decades has been, sufficient to make the University's actions of the State for purposes of the Fourteenth Amendment. *Parker v. University of Delaware*, 31 Del.Ch. 381, 75 A.2d 225 (1950).

Prior to 1948, there was no black faculty at the University and black students were not eligible for admission. Following the

1. *Scott v. University of Delaware*, 385 F.Supp. 937 (D.Del.1974). That Opinion also discusses Scott's filing of a charge of discrimination with the Equal Employment Opportunity Commission, and the right to sue letter her received, which will not be repeated here.

2. *Scott v. University of Delaware*, 68 F.R.D. 606 (D.Del. 1975).

3. (PX-33). The facts recited in that stipulation are hereby incorporated into these findings by reference. The University's relationship to the State is also reviewed in *Gordenstein v. University of Delaware*, 381 F.Supp. 718 (D.Del.1974).

pattern in most southern states, the University of Delaware served the white population of the State while Delaware State College served the black population. In 1948, the Board of Trustees of the University approved a resolution permitting the enrollment of black students who were residents of Delaware, but only if they were enrolled in programs of study which were not available in other state-supported institutions in Delaware. (PX-8, C-117). In 1950, ten black student who had been denied admission to the University brought a class action in the Delaware Court of Chancery. (PX-8; C-117, 118). The court ther upheld the plaintiffs' claim of a Fourteenth Amendment violation and issued an injunction prohibiting the University from denying admission solely on the basis of race. *Parket v. University of Delaware*, 31 Del.Ch. 381, 75 A.2d 225 (1950).

Even after 1950, however, few black students attended the University. Between 1951 and 1969, only 37 black students received Bachelor's Degrees, while 52 received graduate degrees. (PX-8). Until 1961, black students were not allowed to room with white students. (PX-3).

It was not until the last half of the 60's that affirmative efforts were made to encourage black students to come to the University and to attract black faculty. Although these efforts have continued to the present, they have not succeeded in attracting sufficient black students to make the University's student body an accurate reflection of its community. Nor have they resulted in the hiring of sufficient black faculty members to make the University's faculty reflective of the antional academic community. A summary of these efforts is important, however, to put the questions now before the Court in perspective.

Since 1966, the University has operated an "Upward Bound" program designed to identify black students with potential for successful college performance, to motivate them to seek college admission, to recruit them for the University, and to provide them with supportive educational services. (PX-8). IN 1970, this was supplemented by the inauguration of a "College Try" program to provide supportive educational services to students

of low income families during their freshman and sophomore years. (PX-8). In 1968 the admissions office developed a program to attract black students other than through "Upward Bound" and began to apply techniques other than the traditional admissions criteria in evaluating the college potential of black students.[4]

Dr. Edward A. Trabant became President of the University in September of 1968. On October 1, 1968, he wrote a letter to the presidents of approximately 250 colleges and universities, including those which traditionally have had large black enrollments, expressing the University's interest in attracting black faculty and urging the recipients of the letters to refer blacks beginning careers in higher learning or those with prior faculty or administrative experience to him. (DX-48—. Letters of similar import were dispatched by the Provost and the Vice President of Academic Affairs. During the same month, President Trabant established an "Advisory Committee on Policies, Programs and Services Affecting Blacks and Other Minority Group Students". The purpose of this group was to advise the University as to how it might most effectively attract and serve black and other minority students. The product of this group's effort was the Scarpitti Report (PX-2) named after its chairman, Professor Frank R. Scarpitti. This report was presented to the President on March 7, 1969.

The 1968 letters initially produced a list of 53 potential candidates. The follow-up efforts found that many of those were not interested or were seeking positions which the University did not have open. Twenty-six were selected as candidates, and of these, 16 were interviewed and 11 were offered jobs. Seven declined the offers and 4 accepted.[5] This follow-up was reported

4. Other contemporary efforts involved work with guidance counselors in predominantly black high schools in Delaware and surrounding states, meetings with community organizations to stimulate interest in the black community, on-campus group meetings with selected black students, waiver of application fees, appointment of a black admissions officer to recruit black students, etc. (e. g. Worthen M-51-71).

5. Three of the four joined the professional staff and only one became a faculty member.

to all members of the faculty and each was asked to assist in recruiting potential black faculty members. (DX-49).

The Scarpitti Report (PX-2) made numerous and significant recommendations in such areas as black representation on the Board of Trustees, black student and faculty recruitment, creation of a Black Studies Department, social and cultural programs for black students, and additional financial aid to blacks, etc. There was prompt (DX-53) and sustained (DX-54) follow-up to implement most of these suggestions, (e. g. Trabant, N-28-31).

Pursuant to Executive Order No. 11246, the University became obligated to comply with certain federal regulations relating to minority hiring. (41 C.F.R. § 60.2). These require that if an employer doing contract work for the federal government has a work force in which minorities are under-utilized, an affirmative action program must be undertaken. In 1972 the University implemented an Affirmative Action Program which included the area of full time faculty hiring and which will be described in some detail hereafter. (PX-44). This program was overseen by an Affirmative Action Office, headed by a "Coordinator". The first coordinator was Jeannette Sam. Ms. Sam's services were supplemented in 1974 by retention of the services of an Assistant Coordinator, Mr. James Turner. Mr. Turner, a black, has since succeeded Ms. Sam as Coordinator.

While these efforts have not been as successful as originally hoped, they have involved a substantial commitment of resources and do demonstrate a concern on the part of the administration about the underrepresentation of blacks in the student body and on the faculty.[6]

The number of black students in the freshman class rose steadily from 16 (0.9%) in 1967 to 221 (7.8%) in 1972. Despite the

6. There is testimony in the record regarding an unfortunate meeting of a black delegation from the University community and their lawyer with President Trabant and the University's lawyer at which a substantial amount of heat was generated. (Williams A-116-120). While the irritation of the black representatives is understandable, I do not infer racial bias or indifference on Dr. Trabant's part from his conduct on that occasion.

increased number of black freshman enrolled, however, the overall size of the student body has grown at a substantial rate, and it appears that during the 1976-77 school year the undergraduate studen body was only 3.4% black.[7] During the same period the graduate student body had a 1.8% black population. (PX-8, PX-55).

B. *The Sociology Department And Dr. Nolvert P. Scott, Jr.*

In 1967 the Sociology Department at the University was made up of eigh tfull time faculty members. It awarded a Bachelor of Arts and a Master's degree and there was little emphasis on research, scholarship or publication. In the fall of 1967, implementation of a basic policy decision of the President and Trustees was begun. A Doctor of Philosophy Program was to be developed and a new emphasis was to be placed on scholarship and the advancement of knowledge. Four new faculty members, including Dr. Scarpitti, arrived on campus to aid in effectuating this change. (Scarpitti, F-7-9).

In 1969, Dr. Scarpitti became Department Chairman and the Ph.D. program was inaugurated. The teaching load for all faculty members was dropped to six hours and it was understood that at least half the working time of each member would be spent doing research and writing. Between 1969 and 1977 the Department grew from eight full time positions to twenty-one full time positions and became more specialized.[8] In recruiting for these new positions, the Department sought people who had, in the words of its Chairman, "the capabilities of making significant contribution to scholarship that would bring the recognition to the University that we all wanted, the recognition as a scholarly department." (Scarpitti, F-9).

When new faculty members were hired, they were provided with a copy of the "Personnel Policy" of the Sociology

7. This represents 439 black students. (Worthen, M-56).

8. On the graduate level the department concentrates in six areas: deviance, criminal justice, urban sociology, complex organization, sociology theory and sociological methods. (Scarpitti, F-11).

Department, which was originally promulgated in 1969. (DX-8; Scarpitti, F-21). This document purported to state the criteria to be applied in making departmental recommendations for renewal of contracts, promotions in rank and conferral of tenure, as well as the procedure to be followed in reaching such recommendations. The "criteria" section states, in part, as follows:

> The criteria fall into three general categories: (1) teaching efforts and effectiveness, (2) scholarly activity, and (3) service to the department, the University, the community. Criteria in all three categories will be considered in formulating a recommendation.

Dr. Nolvert P. Scott, Jr. was recruited by the University during the 1970-71 school year. He visited the campus and was hired in prference to two other candidates pursuant to a vote of the members of the Sociology Department. At the time of the hiring he had had eight years of teaching experience and was teaching at a Canadian university. (Scott, B-44-45). He was an "ABD" ("all but dissertation"), meaning that he had completed all of the requirements for a Ph.D. except the dissertation requirement. Dr. Scott asked for and received a commitment to pay him at a rate of $15,000 during the first year of his three year contract, if he had received his Ph.D. degree by the time he reached the campus in September of 1971. This was $3,000 above the rate which the Sociology Department had been paying for Ph.D.'s. (Scarpitti, F-40).

During his discussions with the sociology faculty, Dr. Scott was informed that the practice was to evaluate for possible contract renewal at the end of a candidate's second year so that he would have a full year's notice in the event of non-renewal.

Dr. Scott was evaluated at the end of his second year and a decision was made not to renew his contract. The decision was made by a vote of 9 to 1 of the department faculty, with two abstentions. (Scarpitti, F-85). Dr. Scott was advised on May 8, 1973 that his contract would not be renewed when it expired in August of 1974. (PX-9).

C. *The Challenged Employment Practices.*

Dr. Scott presses both disparate treatment and disparate impact claims. First, he asserts that the decision not to renew his contract was racially tainted. In support of this assertion, he cites evidence of other episodes in his life at the University which he perceives as being indicative of racial bias toward him and evidence tending to show that other non-black professors, whom he maintains were similarly situated, were retained for an additional contract term.

In addition, Dr. Scott has maintained throughout this litigation that numerous employment practices at the University have a disparate impact upon blacks and, accordingly, have operated to the disadvantage of himself and other members of the class he represents. During trial, these disparate impact claims were narrowed, and his brief focuses, first, upon the recruitment and hiring practices of the University and, second, upon its practices with respect to contract renewal, promotion and conferral of tenure.

1. *The criteria.*

The University is composed of nine colleges, which contain forty-one separate departments. There are four different ranks among the full time faculty: Professor, Associate Professor, Assistant Professor, and Instructor (or Lecturer). Since at least 1969, the Handbook for Faculty has set out general principles established for university-wide use in appointments to these positions. (PX-88). A "Masters degree (or its equivalent)" is stated as being required for an Instructor's position and a "Ph.D. Degree (or its equivalent)" is stated as being required for the other three positions.[9] In each instance, varying levels of attainment in teaching and scholarship are set forth as requirements. Finally, the Handbook specifies that Instructor

9. It is noted that for "appointments that involve limited professional duties and for certain highly technical fields" the degree or its equivalent requirement may be modified.

appointments shall be for a term of one year, Assistant Professor appointments for a term of one to three years (renewable for similar periods), Associate Professor appointments for a term of three years or "without term" where the candidate has been at the University for three years or more, and Professor appointments without term.

Within the boundaries of these general principles, the University follows a policy of decentralized decision-making. It requires that each individual department adopt more specific criteria, establish its own procedural rules, and make its own recommendations on appointments (PX-88). Some control of this decentralized process is maintained, however. In the fall of 1972, the various departments were required to submit written statements regarding their personnel policies. There were subject to the approval of the University Tenure and Promotion Committee and the Provost. They were to state the criteria on which recommendations would be based, the weight various criteria would be given, and the kinds of evidence by which attainment of the stated criteria would be judged. They were also to state the procedure to be followed and provide for a statement of the reasons for a decision to go to the candidate.

The departmental statements filed in response to this requirement are contained in the recored as a part of PX-72. Many, in accordance with the directive, expressly purport to deal only with promotion, renewal and tenure decisions. Others expressly cover recruitment and initial hires as well. As far as the criteria for appointment are concerned, however, the record indicates that the criteria stated as governing appointments to Assistant Professor, Associate Professor and Professor positions by promotion from within are also applied in filling those same positions from without by hire. Thus, in the criteria area, even those departmental statements which do not expressly cover initial hire are nevertheless helpful in determining the hiring criteria.

While the policies and procedures vary to a degree from department to department, certain generalizations can be made

based on a review of PX-72 and the rest of the record. First the stated criteria uniformly relate not only to teaching and scholarship, but also to what is referred to as "service", meaning service to the department, the University or the larger community. Thus, while variously stated in mroe specific criteria, the three general criteria considered by all departments in making promotion, renewal, and tenure decisions are teaching effectiveness, scholarly achievement, and service. As one would expect, accomplishments and/or potential in these areas is what is looked for in making decisions on initial appointments as well.

While the relevant criteria are thus relatively subjective, the departmental statements add specificity to the decision-making process in several ways. In addition to more specific subcriteria in many instances, the statements refer to the kinds of evidence which the decision-makers will consider as reflecting teaching effectiveness[10] and other criteria.[11] In addition, almost all departmental statements give some indication of the relative importance of the criteria. Some departments assign percentages; other have point systems. Some are more general in approach, stating for example, that all three are given equal weight or that teaching and scholarship are weighted equally, with service being a secondary consideration. Still others allow candidates to select areas of emphasis and to be evaluated accordingly.

The one notable exception to the weighting statements is the policy statement of the Sociology Department as of the date of Dr. Scott's non-renewal. As plaintiff stresses, no indication of the relative importance of the three criteria was provided in that statement and, in practice each member of the department was permitted to utilize his own personal view of the importance to the department of accomplishment in each area.[12] (Scarpitti, F-128). This makes objective analysis and review of a particular

10. Student evaluations, for example, are mentioned by a number of departments, including the Sociology Department. (DX-8).

11. E. g., particular types of publications, participation in curriculum revision, etc.

12. At the time of trial the weights had been established for the criteria. (Scarpitti, F-127).

decision difficult and thus provides greater opportunity for the undisclose doperation of racial bias or stereotypes. This effect is ameliorated to a degree, however, by the requirements that each departmental member articulate to his colleagues the reasons for his vote on a candidate and that a statement of reasons be supplied to the candidate.

The departmental statements as well as the testimony of the department chairpersons provide enlightenment on the practical application of the "Master's Degree (or its equivalent)" and "Ph.D. (or its equivalent)" requirements. The concept of "equivalent" encompasses at least three distinct categories of candidates: the ABD who is on the verge of receiving a doctorate, the recipient of whatever the terminal degree is in the field where a Ph.D. is not offered, and the person who has significant prior experience in the areas of teaching, scholarship, or service which is deemed to make him or her as valuable to the department as one with the requisite degree of formal academic training. The charipersons' testimony also indicated that, despite the declarations of the Handbook, a number of Departments had positions which they felt did not require a Ph.D. holder, or, in some instances even a Master's degree holder, and made their appointments accordingly.

Overall, in the 1976-7 school year, the University employed 13 Professors, 24 Associate Professors and 65 Assistant Professors with Master's degrees, and one Professor, one Associate Professor and three Assistant Professors with Bachelor degrees. (PX-71). While the testimony indicates that some of these 107 non-Ph.D. professors, who represented 15.7% of those serving in positions requiring a "Ph.D. or its equivalent", were hired at a time when the Ph.D. requirement was less emphasized than at present,[13] many are recent hires who either were deemed to have

13. On a University-wide basis, the emphasis on doctorates does not appear to have materially increased in recent years, however. The 1976-7 Ph.D. Masters mix was 73%-27%, while the 1971-72 ratio was 74%-26%.

experience equivalent to a Ph.D.[14] or who were placed in positions which the department felt did not require a Ph.D.[15]

2. *The procedure.*

When there is a vacancy to be filled from the outside, the department forms a Search Committee and prepares a position announcement or job description. The position announcement is then submitted to the Affirmative Action Office for a decision on whether it contains qualifications which are unnecessary or have a discriminatory effect. If the document is approved, the department is given permission to advertise and is advised o the remaining requirements of the Affirmative Action Program. All advertisements must contain a statement, and all recruiting sources must be advised, that the University is an equal opportunity, affirmative action employer. (PX-45A). A list of contacts likely to reach black applicants, e. g. predominantly black schools, minority publications, and black caucuses of various professional associations, is provided to the department. The department is further advised to retain all of its records with respect to its search. (Turner, G-132-134).

The Search Committee reviews the written resumes submitted in response to its solicitations. These resumes do not ordinarily

14. Examples in this category include James Sills, a black Assistant Professor or Urban Affairs with a Master's degree, Edmund Glenn, a Professor of Communication with a Bachelor's degree, Nancy King in the Theater Department, Associate Professor Teter in Civil Engineering, Assistant Professor Eleanor Craig in Economics, Professor Earl in Computer Science, Associate Professors Molyneux and Ruark in English. Several department chairmen explained that the absence of a degree could be overcome by prior distinguished service in one's field. E. g., Bray, J-26; Lee K-30; Salsbury, K-76; Donnelley, J-60; Vinson, K-99; Salisbury L-16; Warter, L-78.

15. Seven of eight Home Ecomonics Assistant Professors have only Master's Degrees. (Bieber, J-125). The Allied Health Professions Unit, which trains students in medical technology and physical therapy, ahs no Ph.D.'s, and some Bachelor's on its faculty. (Clark, J-136; Lurie, K-15). In the Physical Education Department, of 34 faculty, only seven speciality positions require that Ph.D. The other positions are filled by Master's and Bachelor's recipients. (Brown, K-46). The Chairman of the Animal Science Department indicated that a Master's candidate would be considered for a specialized position. (Salisbury, L-16).

reveal the race of a candidate. The field is narrowed based on the training and experience reflected in the resumes. Thereafter candidates are invited to the campus to confer and, in some instances, to make a presentation. The Committee, or in some instances the entire department, then makes a recommendation for the position. No offer, written or oral, can be made without a submission of all recruitment data, including all resumes, to the Affirmative Action Coordinator along with an "Affirmative Action/Organizational Sign-Off Form" which summarizes the credentials of the candidate recommended, the number of applicants known to have been a member of a minority group or female, the recruiting efforts made, and the reasons for preferring the recommended candidate over any other applicant known to be a member of a minority group or female.[16] The Affirmative Action Coordinator, after reviewing the procedure used and the candidates considered can approve the recommended choice or veto it. If it is approved, the Sign-Off Form is signed by the Coordinator and filed in his or her office. (Turner, G-136-137). Ultimately, approval of new appointments must come from the Provost and the President.

Since 1974, the Affirmative Action Office has required departments to send out an "Applicant Supplemental Form" (DX-59) to each applicant for an academic position. The form, which is returnable to the Affirmative Action Office, guarantees anonymity and asks the applicant to indicate his or her racial/ethnic background, age and sex. The returns are utilized by that office in monitoring the hiring process.

The testimony of the Coordinator and the department chairpersons convinces me that the provisions of the Affirmative Action Program are, in fact, followed in the recruiting and hiring process and, in particular, that the recommended recruitment sources are contacted on a regular basis.[17]

16. DX-91, 98, 105-448.

17. Scarpitti, F-14; Rees, H-94; Chesson, I-28; Borden, I-75; Wetlaufer, I-95; Marks, J-4; Smith, J-54; Bieber, J-121; Clark, J-130; Gaither, K-39; Brown, K-48; Salsbury K-79; Leathrum, K-92-93; Salisbury, L-9; Exline, L-32-33; Homer, L-45; Markell, L-53; Mosberg, L-65.

While procedures for renewal, promotion and conferral of tenure vary from deaprtment to department, most follow a similar pattern. Each year the department chairperson evaluates each faculty member's teaching, scholarship and service and fills out a Faculty Appraisal Form. Review for purposes of recommendation for contract renewal, promotion or tenure can be requested by anyone in the department in cluding the potential candidate himself. In some instances there are established times for review as, for example, at the end of the second year of a three year term. The candidate prepares a dossier and a review is conducted by the members of the department or some segment thereof. After a departmental recommendation there are subsequent reviews at the college and university levels. Final decisions are made by the President subject to confirmation by the Board of Trustees. (Kraft, I-61-64).[18]

D. *The Market For Black Academics.*

The University recruits nationally. All of the witnesses agreed that the national market for black academics is presently, and since Executive Order 11246 and the birth of affirmative action plans has been, a seller's market. (Blackwell, C-107; Lee, D-66). There are somewhere in the neighborhood of 2,000 colleges and universities in the country. (Blackwell, C-110; Lee, D-64). While the number of blacks with graduate degrees is the subject of some debate, one respected source reports that, exclusive of doctorates in Education, only 236 blacks earned their Ph.D.'s in 1973, 325 in 1974, and 387 in 1975. This averages out to about one-half of one black Ph.D. exclusive of education, for each college or university in the country during the three year period from 1973-1975. (DX-46). In some disciplines the total number of blacks holding a Ph.D. degree, including both new and existing degrees, is quite small. It was estimated, for example, that there are only

18. Apparently, approval of promotions, renewals and conferrals of tenure by the Affirmative Action Office is not required. Mr. Turner did testify, however, that his office "monitors" the process "to make sure . . . [blacks] are given the same kind of opportunity for promotion as other faculty members are." (B-38).

somewhere between 250 and 300 black Ph.D. Sociologists in the country. (Blackwell, C-106, Lee, D-63).

The percentage of those with graduate degrees who are black remained relatively constant between 1965 and 1975. Recently, however, the situation has begun to improve. In 1977 blacks comprised 6.4% of all graduate school students. That is an increase from 5.2% in the previous year. (Blackwell, C-42).

The excess of demand over supply results in black academics receiving competing offers from a number of institutions and, in many instance, higher salaries to blacks than to whites with similar experience and credentials. (Brown, G-41; Warter, L-83; Siskin, O-48). Professor Scott, for example, had two dozen institutions interested in him when he was hired by the University of Delaware (Scott, B-146) and, as earlier noted, the University had to offer him $3,000 over its prevailing rate for Ph.D.'s in order to get him. (Scarpitti, F-40). All of the experts confirmed that this was a common situation.

Thus, black academics typically have a number of alternatives open to them and a college or university cannot expect to hire black faculty members simply by being open to that possibility. An institution must be active and competitive in order to attract black faculty members. One of plaintiff's witnesses put it this way:

> . . . It seems to me what happens in most cases is, the average black Ph.D. or person who is specializing in a given field, has a choice of many opportunities, and he normally does not have to seek out the University of Delaware or any other college for a job opportunity. But tendencies are, he may be more apt to be recruited than he is to go out and seek a job. . . . I think it is important to recognize the realities, because there are so few blacks. Those who are available and who are qualified tend to have people recruiting them, and I don't know of anybody specifically who has applied for a job at the University of Delaware and was denied a job opportunity because of their race. But I do think that most universities that are enlightened, have a policy in trying to improve their educational system, and provide an opportunity for their students to be exposed to all races and

creeds and truly represent a universal kind of educational opportunity.

(Williams, A-127-28).

While there are varying estimates in evidence, I accept the figures of plaintiff's expert, Dr. Siskin, as being reasonable estimates of the available labor pool. Dr. Siskin estimated that of the national pool of Ph.D.'s in disciplines which are taught at the University, weighted to reflect the actual distribution of Ph.D.'s at the Univesity among those disciplines, would have a black participation of approximately 2%. A similar pool of people holding Master's degrees in the relevant disciplines would have about a 4% black population. Utilizing the 1976-77 Ph.D.-Masters mix at the University, 73%-27%, Dr. Siskin estimated that the available labor pool was 2.55% black.

Between September of 1974 and February 1 of 1977, 5,171 responses on the Applicant Supplemental Form were received by the Affirmative Action Office. This represented a 75% response rate.[19] The black portion of responding job applicants constituted 1.56% in 1974-5, 1.83% in 1975-6, and 2.38% for a portion of the 1976-7 school year. (DX-60-A, 60-B, 60-C). The percentage of responses by black applicants over the entire period was 1.78%

E. *The Black Perception Of The University.*

While some evidence suggests that the situation has been improving in recent years, it seems clear that the University has not been viewed by the black academic community as offering an hospitable environment. Isolating the reasons for the reputation of an institution is more difficult than recognizing the existence of that reputation and its general character, but the record in this case does suggest some of the sources of the University's negative image in the black academic community.

Part of the problem relates to location. The University is situated in a small community and, as one of plaintiff's witnesses

19. There were 1,705 who failed to respond.

put it, there is no "indigenous black population near the campus."[20] Part of the problem relates to what is perceived to be the philosophical orientation of University and its administration. In short, the University is viewed as an "ultra-conservative" institution.[21]

It also appears that the University is perceived by many to be generally "indifferent" or "insensitive" to blacks and their problems. This perception seems to stem from three things: (1) the segregated history of the University and the fact that most steps toward integration were compelled by external forces, (2) an unfortunate and well publicized episode in the spring of 1970 involving the failure to secure the services of a black anthropologist, Jennetta Cole, and (3) the inability of the University to hire more black faculty members than it has.[22] The impact of the University's history in race relations is understandable without further explanation. The second and third factors warrant further comment, however.

Information and impressions circulate efficiently in the relatively small community of black academics and the experience of individual black academics at a particular institution tends to affect its image throughout that community. Such was the case with Jennetta Cole. Professor Cole was recruited by the University for the position of Director of the Department of Black Studies in 1970. During her visit to the campus she was enthusiastically received by both students and faculty. She was offered an Associate Professorship and asked to serve as Director of the Department. Professor Cole was married to a white economist, however, and would not come to the University unless he were offered an Associate Professorship by the Economics Department. The Economics Department was willing to create an Assistant Professor position for him, but took the position that he had insufficient research and writing

20. Newton, A-160.

21. Newton, A-151.

22. *See* Section IF, *infra.*

experience to merit Associate Professor status. The University Provost undertook to persuade the Economics faculty to change its position but Dr. Cole was forced to act on an outstanding offer from the University of Massachusetts while this debate was going on and she accepted the position there. The failure to move quickly in making an offer to Dr. Cole was perceived on the campus as "foot dragging" and as an indication that the administration did not really want to have Dr. Cole on the faculty. As a result, 42 black students staged a demonstration on Honors Day. (Scarpitti, F-27-32).

The inability of the University to hire more blacks than it has is significant for two reasons. First, it suggests to some blacks the idea the the University is "not really trying" to attract black faculty and, therefore, is not concerned about overcoming the effects of past discrimination. In addition, however, the most important effect of the University's performance in black hiring is that black academics, regardless of any image they may have of the attitude of the administration and faculty, are reluctant to join a community in which there are very few other blacks. Plaintiff's experts, as well as other witnesses, testified that an institution must achieve a minimum "critical mass" of blacks in its faculty community before it can expect to become an attractive environment for the majority of potential black faculty members. (Blackwell, C-30). The absence of such a "critical mass" fosters concern on the part of black academics about possible isolation and tends to encourage their pursuit of other available opportunities. Thus, insitutions attempting to move from an all white or al virtually all white faculty to one representative of the national academic community face a difficult task until they reach the "critical mass" point and may find it necessary to offer extraordinary monetary or other inducements in order to reach that goal.

F. *The University's Experience With The Hiring Of Full Time Faculty.*

Plaintiff's evidence shows the following participation of blacks

on the University of Delaware full time faculty during the thirteen year period from 1964-65 to 1976-77.[23]

TABLE 1[24]

YEAR	FULL TIME TOTAL FACULTY	FULL TIME BLACK FACULTY	% BLACK
1964-65	323	0	0.0
1965-66	342	1	0.3
1966-67	381	2	0.5
1967-68	438	1	0.2
1968-69	498	2	0.4
1969-70	542	3	0.5
1970-71	616	4	0.6
1971-72	646	8	1.2
1972-73	683	15	2.2
1973-74	714	13	1.8
1974-75	753	12[25]	1.6
1975-76	765	13[25]	1.7
1976-77	818	12	1.5

Plaintiff's evidence (PX-66) also shows the number of black hires to full time faculty positions for each year during the same period:

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23. There is insufficient information in the record regarding part-time faculty to permit reasoned inference. The Affirmative Action Coordinator testified that he was aware of no part-time availability statistics. (Turner, P-50).

24. Source: PX-66, PX-71. Plaintiff's Opening Brief, p. 9.

25. PX-66 lists both Mary Farrell and Eugene Eubanks as faculty members from 1969-1976. However, it appears that both left in 1974. See DX-471B and DX-471C. Farrell testified that she left in 1974 (Farrell, A-136), as did Dr. Bohner (H-38). Dr. Marks testified that Eubanks left in 1974. (Marks, J-7). DX-97, Eubanks' letter of resignation, dated April 1, 1974, also supports this. PX-66 does not list Dr. William Campfield as a full time faculty member. However, Dr. Markell, Chairman of the Accounting Department, testified that Dr. Campfield, who is black, was a visiting professor in that department for one year. (Markell, L-55). DX-471C confirms that Dr. Campfield was a visiting professor for the 1974-5 year.

TABLE 2

YEAR	#
1964-65	0
1965-66	1
1966-67	1
1967-68	0
1968-69	1
1969-70	1
1970-71	1
1971-72	6
1972-73	8
1973-74	2
1974-75	3[26]
1975-76	3
1976-77	0

Unfortunately, neither the plaintiff's nor the defendants' evidence gives a wholly reliable figure for the total number of full time faculty hires during this period or any portion thereof.[27]

Between 1965 and 1970 there were only four black full time members of the University faculty. One of these was Dr. LeRoy Allen, a former President of Cheyney State College, who was brought into the Education Department as a full professor with tenure in 1968.

Between September of 1970 and the 1976-77 school year, various departments succeeded in bringing 23 blacks to the campus as full time faculty members or visiting professors. (PX-66). These men and women served in Education, English, Home

26. PX-66 did not include Dr. Campfield.

27. After specifically disavowing an intention to offer such data under circumstances leading plaintiff reasonably to rely on that representation, the defendant tendered such evidence at the end of the third week of trial. It was excluded for the reasons articulated by the Court at M-34-5 and N-89-90. *See also* M-2-9, M-29-34, L-2-6. The proffered evidence, the accuracy of which plaintiff challenges, tended to show that from the 1971-72 school year to the 1974-75 school year, 369 new people were hired as Instructors, Assistant Professors, Associate Professors and Professors, of whom 17 or 4.6% were black. (N-92).

Economics, Sociology, Black Studies, Secretarial Studies, Art, Physical Education, Nursing, Theater, Music, Life and Health Science and Accounting. (PX-66).

The record indicates that during the 1970 to 1977 period an additional 24 blacks either refused an offer of employment by a University Department as a full time faculty member or withdrew their applications while the University remained interested in them and was negotiating. At least four of this number declined two different offers or invitations.[28] The Departments involved were Black Studies, Sociology, English, Theater, Chemical Engineering, Political Science, Mathematics, Home Economics, Biological Sciences, Music, Physical Education, Mechanical and Aerospace Engineering, Psychology, Accounting, and Business Administration. A review of a few of these situations will give an idea of the efforts that were made and the problems encountered.

Dr. Newton, who is head of the Black Studies Department and is himself black, testified that his top three choices for an Assistant Professor opening in 1975 or 1976 were black. One refused the offer and remained at predominantly black Howard University. Another required $20,000 and Associate or full Professor status. The third chose to go to another institution at the last minute. (Newton, A-176).

The Sociology Department, in approximately 1974, attempted to interest Prof. Edward Driver at the University of Massachusetts in coming to Delaware to succeed Dr. Scarpitti as Chairman of the Department. Professor Driver indicated it would require a salary of $32,000 to interest him. This was above the level that the Department had been paying its chairman so it asked the University President and Provost whether negotiations should be terminated. The recruiters were told that the salary demand need not be a bar. Professor Driver ultimately decided to stay at Massachusetts, however. (Harlan, H-11, 12).

28. Michael Gates (Hansen, H-133), Melvin Ramey (Chesson, I-28), Raymond Hall (Boyer, L-15-25; Ingersoll, J-34), and Robert Eubanks (Chesson, I-28; Vinson, K-100).

On three occasions, departments managed to get blacks to campus as visiting professors and then attempted unsuccessfully to talk them into staying.[29]

In 1971, the Political Science Department voted unanimously to hire Raymond Hall. (DX-61). He had been sought out through personal contact. Initially, he accepted the offer (DX-63) but later indicated that he would be unable to come that year. (Ingersoll, J-34; Boyer, L-15-25). The offer was then renewed for the following year. (DX-71). When Hall did not respond promptly to the renewed offer, the Department increased the amount of the offer. Hall went to Dartmouth, however.

Efforts have also been made to find blacks in industry. The Chemical Engineering Department recruited a black Ph.D. employed by the Mobil Oil Company, had him to the campus for an interview, and expressed interest in his joining the Department. He decided to remain in industry, however. (Metzner, K-120).

In 1974, the Department of Business Administration offered Dr. Jessie Colson a position as Chairperson of the Department of Secretarial Services with tenure. (DX-76). Dr. Colson initially accepted but was later relieved of her contractual obligation at her request. (Norman, L-88-96).

At the time of the last opening in the Physical Education Department, two qualified black candidates withdrew themselves from consideration when advised of the salary. (Brown, K-49; DX-394). A third, Raymond Ricketts, was offered the position and accepted it. (Brown, K-49). A short time later, however, he was released from his contract when he received a $1,000 higher offer from a university which he considered to have a more prestigious basketball program. (Brown, K-49; DX-394).

On two occasions, in 1972 and 1974, the Home Economics Department made offers to black candidates. First, Linda Jolly was offered a position (Bieber, J-116; DX-99), but turned it down

29. Dr. Campfield, Accounting (Markell, L-55); R. Eubanks, Civil Engineering (Chesson, I-28) and Mechanical and Aerospace Engineering (Vinson, K-100).

(DX-100). Two years later, an offer was made to Lily Glover (Bieber, J-120; DX-103), who also refused it. (DX-104).

The Music Department made an offer to Glenn Gore, who turned it down for what he thought was a more desirable position (Lee, K-32). There have been similar experiences in the Departments of Biological Sciences (Clark, J-132-33), Psychology (Exline, L-32), Civil Engineering (Chesson, I-28), and Urban Affairs (Brown, G-39).

These experiences indicate that substantial efforts were made by many departments during the 70's to actively recruit blacks for full time faculty positions. They do not suggest that all of these efforts came without some prodding from the administration. President Trabant told the College of Marine Studies at one point that he would not approve any contracts for the Department, employment or otherwise, until they hired a black. (Trabant, N-48). He also threatened to disapprove all employment contracts of the Physical Education Department until it hired a black. (Trabant, N-49).

In 1975, the University established "Affirmative Action Goals and Timetables" for the hiring of blacks and females to faculty positions for the five year period from 1975 to 1980. (PX-45B). It was projected that there would be 206 hiring opportunities, of which 27, or 13.1% would go to blacks. (Turner, P-3-4). PX-45B also indicates the goals and timetables for each year:

TABLE 3

YEAR	PROJECTED HIRING OPPORTUNITIES	BLACK GOAL
1975-76	59	3[30]
1976-77	41	6
1977-78	38	6
1978-79	36	2
1979-80	32	13

30. The Goals and Timetables were not completed until December of 1975. (Turner, P-5).

During the 1975-76 school year and prior to trial in April of 1977, three blacks were hired in full time faculty positions, two on a permanent basis and one as a visiting professor.[31] (Turner, P-34-35; PX-66).

G. *The University's Experience With The Renewal, Promotion And Tenure Of Black Full Time Faculty.*

The only evidence of a failure to renew a black full time faculty member is evidence pertaining to Dr. Scott's non-renewal.

The record is virtually devoid of data on black promotions and promotion eligibility, per se. We do know, however, that when the EEOC conducted its investigation in 1975, three of the fifteen blacks then on the faculty had become eligible for promotion, in the EEOC's view, during the preceding three years and two of them had been promoted. (PX-56, p. 5). The data on black participation in conferrals of tenure is somewhat fuller. In 1976, there were 314 tenured faculty members at the University, only two of whom (Professors Allen and Newton) were black. Thus, only .6% of the tenured faculty was black. This figure can only be evaluated, however, with reference to the number and experience of black factulty theretofore employed by the University.

Since 1965, the University has hired 27 full time black faculty members,[32] three of whom were visiting professors. Of those 27, only two had been tenured at the time of trial. What follows is an analysis of the career patterns at the University of the 26 black faculty members other than Dr. Scott.

Dr. LeRoy Allen, the former President of Bluefield State College and Cheyney State College (Newton, A-148), was hired in 1968 as a Professor of Education. He was hired with tenure. He has remained at the University from 1968 to the present.

31. The record does not indicate the actual number of hiring opportunities which occurred during this period.

32. In addition to the 26 full time black faculty members listed on PX-66, Dr. Markell, Chairman of the Accounting Department, testified that Dr. William Campfield, who was black, was a visiting professor in that department for one year. DX-471C lists Dr. Campfield as a visiting professor for the 1974-5 year.

In 1972, Dr. James E. Newton was hired as an Assistant Professor[33] in Education. (Newton, A-143). In 1974, he resigned that post to become the Director of the Department of Black Studies. (Marks, J-15). He was an Associate Professor in the Black Studies Department. After a total of three years at the University, spent in two different departments, Newton was granted tenure in 1975. (Newton, A-149).

Dr. Gloria Hull was hired as an Assistant Professor in the English Department in 1971. (Bohner, H-41). At the time of trial, in 1977, she had qualified for and been nominated for promotion to Associate Professor with Tenure.[34] (Bohner, H-41). This nomination had been approved by the Provost, and remained only to be approved by the Board of Trustees. (Bohner, H-41).

James H. Sills, Jr. was hired as an Assistant Professor in Urban Affairs in 1971. (Sills, E-3). When he was hired, he had the degree of Master of Social Work. (Sills, E-24). Despite not having yet received his Ph.D.,[35] he expected to be eligible for promotion in 1977. (Sills, E-26). This was due, in large part, to field experience he had in lieu of a Ph.D. (Sills, E-25, E-3-4).

Other than these four professors,[36] no black faculty member ever hired at the University had remained on the faculty for more than three years and also held a Ph.D., the normal minimum criteria for promotion to a tenured position.[37] As will be shown

33. PX-66 lists him as an Associate Professor. However, he testified that he was an Assistant Professor. (Newton, A-143).

34. Hull was not nominated for promotion and tenure in her fifth year at the University, so she resubmitted her application in her sixth year and was nominated. (Bohner, H-68).

35. At the time of trial, he was working toward his Ph.D.

36. In 1974, Dr. Jessie Colson was offered a tenured position as Chairperson of the Department of Secretarial Sciences. (Norman, L-88; DX-76).

37. The record indicates that it was possible to be promoted to a tenured position after only three years service, although normally tenure was awarded after a longer period, in many cases, six years. No black faculty member had ever remained on the faculty for six years without being promoted to a tenured position. In addition, there is evidence that it is possible to be promoted to tenure without having a Ph.D. (e. g. Sills). However, this requires other "equivalent" experience, which there is no indication that any of the non-Ph.D.'s with more than three years service possessed. (Washington, Gregory, Miles and Farrow).

below, most of the other black faculty did not stay at the University for a sufficient period of time, or were otherwise unqualified, to be rpomoted to tenured positions. However, the record also indicates that those faculty members who left the University did so voluntarily for their own reasons, and not because the University refused to retain them.

Dr. Hilda Davis was a lecturer in the English Department from 1965 until 1970 when she retired at the age of sixty-five. (Bohner, H-37). Her degree was in Sociology and she taught primarily in the Writing Center, a branch of the English Department which provides remedial service on a tutorial basis. (Bohner, H-37, 38, 67).

Mary V. Farrell, who held a Master's degree, was an Instructor in the English Department from 1969-1974. (Farrell, A-136). She left in 1974 to accept a position at Lincoln University because she felt she could make a greater contribution to black students there. (Bohner, H-38; Farrell, A-138). At the time she left, she had been recommended for promotion to Assistant Professor. (Farrell, A-138).[38]

Richard Morse was a joint appointee as an Assistant Professor in Sociology and Education in 1966. He left in 1967 to go to Stillman College, a small black school in Alabama. (Harlan, H-5; Scarpitti, F-18). The University subsequently tried to get him to return, without success. (Scarpitti, F-18). Dr. Eva Adams was an Associate Professor in Home Economics from 1970 to 1973. (Bieber, J-114). She then resigned to become the Chairperson of the Home Economics Department at Delaware State College. (Bieber, J-116, DX-101).

In 1971, Katherine Morgan was hired as an Assistant Professor in the English Department. (Bohner, H-39). She stayed for only one year. and then accepted a joint appointment from Swarthmore, Haverford and Bryn Mawr. (Bohner, H-40). Dr. Eugene Eubanks was hired as an Assistant Professor of

38. Although PX-66 shows that she remained on the faculty until 1976, this is refuted by her testimony, as well as by DX-471B and DX-471C.

Education in 1972. (Marks, J-4). He resigned after two years in 1974,[39] (Marks, J-7, DX-97), and went to the University of Missouri for higher pay. (Marks, J-14).

Dr. Wilfred David and Dr. Livinus Ukachi were both hired as Associate Professors in Black Studies in 1971. (Wilson, B-31, 37; PX-66). Ukachi left after one year and David after three. (PX-66). John Cook was hired as an Assistant Professor in the Art Department in 1972. (PX-66) He remained for only one year. Esther Washington was an instructor of Secretarial Studies from 1972 until the time of trial. (PX-66). Constance Smith was hired as an Associate Professor of Black Studies in 1972, with only a Master's degree. (PX-66). She left after one year.

Linda Tue was an Instructor in the English Department from 1972 to 1975. (PX-66; Bohner, H-42). After three years, she decided not to go on for her Ph.D., (Bohner, H-42), and left the University. Theodore Gregory, who has only a Bachelor's degree, (Brown, K-47), was hired as an Instructor of Physical Education in 1972, where he remained at the time of trial. (PX-66). Elizabeth Miles, who also has only a Bachelor's degree, was hired as an Instructor of Physical Education in 1972. (PX-66). In 1975, she moved to the Theater Department, where she is an instructor of dance. (Hansen, H-127). Eliza Farrow has been an Assistant Professor of Nursing since 1973, and has a Master's degree. (PX-66; Wandelt, H-142).

Robert Eubanks was a visiting professor jointly in Civil Engineering and Mechanical and Aerospace Engineering in 1973-1974. (Chesson, I-28; Vinson, K-100). When the year ended, both departments offered Eubanks permanent employment, but he refused both offers. (Chesson, I-28); Vinson, K-101). He also turned down an offer of an Associate Deanship at the University. (Greenfield, M-44). Dr. William Campfield was a visiting professor in the Accounting Department for the 1974-5 year. (DX-471C). After that year, he was asked if he would consider

39. Although PX-66 shows that he remained in the faculty until 1976, this is refuted by the testimony by Dr. Marks and by DX-471B and DX-471C.

staying at the University, but declined to do so. (Markell, L-55). George Walker was a visiting professor in the Music Department for the 1975-6 year. (Lee, K-27).

Dr. Thomas Curtis was hired as an Assistant Professor of Criminal Justice in 1974. (DX-66). Dr. Althea Williams was hired as an Assistant Professor in the Art Department at the same time. (Teis, K-109). Each remained at his or her respective position in their third year, at the time of trial.

In 1975, Dr. Patricia DeLeon was hired as an Assistant Professor of Life and Health Sciences. (Clark, J-132). At the time of trial, she remained in that position for a second year. James Symmons, with a Master's degree in Fine Arts, was hired as an Assistant Professor in the Theater Department[40] in 1975. (Hansen, H-128). He remained at that position at the time of trial.

Thus, of the 26 full time black faculty at the University since 1965 other than Dr. Scott, four were tenured or close to tenure at the time of trial. One other had left after she had been recommended for promotion. Three were visiting professors who stayed for only one year. One retired after being on the faculty for five years. Two left after three years service; two left after two years service; and five left after only one year of service. There is no evidence that any of these nine black faculty members left other than voluntarily.

Of the ten non-tenured blacks on the faculty at the time of trial, two[41] were in their sixth year of service, three[42] were in their fifth year of service; one was in her fourth year; two were in their third year; and two were in their second year.

II. THE DISPARATE TREATMENT CLAIM.

Relying primarily on *McDonald v. Santa Fe Trail*

40. PX-66 lists Symmons as being an Assistant Professor in Health and Black Studies. However, Dr. Hansen testified that he was on the Theater Department faculty.

41. Hull and Sills.

42. All three are instructors. Two, Gregory and Miles, have only Bachelor's degrees. The third, Washington, has a Master's degree.

Transportation Co., 427 U.S. 273, 96 S.CT. 2574, 49 L.Ed.2d 493 (1976), Dr. Scott asserts that because of his race he was denied an equal opportunity to qualify for a tenured faculty position at the University. In support of this contention he relies primarily upon evidence that other non-black professors were reevaluated for renewal in the third year of their initial contract and/or were renewed for additional periods and thus afforded greater opportunity to qualify for tenure.[43] In order to make the comparisons which plaintiff invites, further facts are necessary concerning Dr. Scott and several other faculty members.

A. *Scott.*

Scott began his service at the University in September of 1971. As of that date, his experience included eight years of teaching at a Canadian university and three years as a part-time graduate teaching assistant at Penn State. (Scott, B-44-45). Scott acknowledges that at the time of the commencement of his service to the Sociology Department, he knew that teaching and scholarship were two of the three criteria considered in renewal and tenure decisions in the Sociology Department. (Scott, B-97; Scarpitti, F-21). He likewise acknowledges that he expected to be reviewed for possible renewal of his three year contract in the spring of 1973. (Scott, B-158). I am confident that Dr. Scott had learned at least shortly after his arrival on campus of the departmental emphasis on scholarly research and publication.[44]

43. Dr. Scott, as I understand it, does not maintain that he should have received tenure at the end of his initial three year term.

44. The record shows that this was communicated to him by his colleagues. For example, Dr. Finner testified:

> Q Before the time came for the evaluation of Dr. Scott for renewal of his third year contract, had you spoken to him at all about the need for publication?
>
> A Yes.
>
> Q Describe to the Court what you said and when and how often.
>
> A I can't remember when, and it certainly was not more than two or three times, but I remember, as he was finishing his first year going into his second year, I remember asking him what he was doing, if he had anything rolling, because I realized that evaluation was going to be

In March of 1973 Dr. Scott was informed that he should complete his dossier for evaluation by April 16, 1973. (DX-16). On May 1, 1973, the Sociology Department faculty met. (Scarpitti, F-78) The faculty believed that there was inadequate evidence of research activity to be evaluated in the dossier, and Scott was asked to prepare an addendum regarding his scholarly achievements. (Scarpitti, F-80). On May 3, 1973, the faculty senior to Scott met and recommended a denial of renewal. (Scarpitti, F-82). On May 8, 1973, the full Sociology Department faculty met (PX-12), and voted against renewal 9 to 1, with 2 abstentions. (Scarpitti, F-85; PX-9). As a result, Scott's service to the University was terminated when his contract expired after the 1973-4 year.

On May 9, 1973, Chairman Scarpitti wrote to Scott notifying him of the Department's recommendation and setting forth the reasoning which lead to that recommendation. The letter stated in part:

> * * * It was the consensus of the department faculty that your performance in the areas of teaching and scholarship have been below the standard that we wish to maintain in the department. In the area of service we found your performance to be adequate, although here there was some mixed feeling. It is not the faculty's belief, however, that an adequate performance in the area of service is enough to compensate for perceived deficiencies in the areas of teaching and scholarship.

The letter then went on to comment on the perceived deficiencies in Scott's teaching effectiveness and scholarship. It spoke of

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44 Continued
coming up the following spring. So I did, you know, say, "You ought to get something going." or something like that.

Q Was it your impression at that time that perhaps he didn't have anything going?

A Yes it was. I did not get an impression that he had anything going.

Q And your suggestion to him was what?

A That this was a very important area to be concerned with in the department.

F-187).

persistent complaints by a large number of Dr. Scott's students about lack of preparation, class time wasted with extraneous discussion, and the inhibiting of expression of student opinion, etc. It also noted Scott's prior teaching experience and the faculty's view that he should have been able to demonstrate more teaching effectiveness than he had after ten years of teaching. On the subject of scholarship, the letter observed:

> The difficulty we perceive in your teaching is compounded by the faculty's belief that you do not show the necessary promise in reserach and publishing. Your scholarly activities in the two years you have been on our faculty have been very limited. Indeed, to this date, no specific research has been undertaken by you with the aim toward scholarly publication. Your plans for the future were found to be imprecise and generally inadequate.

(PX-9). The letter concluded with an offer by Scarpitti to do whatever he could to help Scott locate a new position.

In the fall of 1973, Scott underwent open heart surgery and was on sick leave for the entire first semester. (Scott, B-67). He returned to teach Introduction to Sociology and American Minorities in the spring of 1974. He left the University upon the expiration of his contract on August 31, 1974.

It is clear from the record that from September of 1971 until the time of his evaluation for contract renewal, Scott had undertaken very little in the way of research and had produced nothing by way of scholarly publication. Moreover, he had nothing of substance underway or planned[45] at the time of the

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45. The only evidence of a publication by Scott between the time of his hire and May of 1973 was an article on the Canadian elections which appeared in the *Wilmington Morning News* on November 23, 1972. (Scott, B-99; PX-18). At that time, he was also working on a syllabus of reprints to be used along with an introductory sociology book for Warner Modular Publications. (Scott, B-164; Scarpitti, F-81; PX-18). That syllabus was published in the latter part of 1973, although it does not appear to reflect substantial research on Scott's part. Scott also testified that he had been working on a paper for "Social Problems", a journal, which was not accepted for publication (Scott, B-99), and that his work for a local school district could possibly lead to later publications. (Scott, B-99). Dr. Scarpitti testified that there was "nothing of substance" in Scott's dossier in May of 1973, (Scarpitti, F-80), and it is clear that in terms of what the other

May 1973 decision on renewal. These deficiencies weighed heavily against him in the minds of most of the Sociology faculty, (Finner, F-188, G-6; Brown, G-48; Eckhardt, G-76; Harlan, H-9; Dynes, H-24; McFarlane, DX-23, p. 14).

Dr. Scarpitti had evaluated Scott's effectiveness as a teacher on two occasions prior to the renewal evaluation, once on November 29, 1971, and once on November 14, 1972.[46] In 1971, Scott was assigned values of 4 on a scale of 10 for effectiveness as an undergraduate teacher and effectiveness as an undergraduate advisor. In 1972, values of 6 were assigned for those categories. While this was described as a "marked" improvement over the preceding year by the Chairman in his written comments, no member of the Sociology faculty received a lower grade in these categories in 1972. (Scarpitti, F-72, F-147).

During Scott's first year and the spring of his second, Chairman Scarpitti and other members of the faculty received numerous complaints from their advisees and other students of the kinds described in Scarpitti's letter.[47] There was also a Student Government Association course evaluation in the fall of 1971, which rated Scott's "Social Problems" course. (DX-18). In that student evaluation, only 29% of the class responded (35 of 120). 45.5% of those responding believed that the lectures contained mainly irrelevant materials. 55.9% believed that the course had not contributed to their growth or development. 70.5% felt Scott, as a teacher, was "below average" or a

45 Continued
members of the Department considered to be signigicant scholarship, this was an accurate statement. Scott reviewed the book *Death of White Sociology*, and his review was accepted for publication sometime in 1974 by the Journal of Marriage and the Family.

46. PX-11 and 12.

47. Dr. Scarpitti testified that he received twelve to fifteen such complaints. (Scarpitti, F-133, F-62-66; see also DX-14). Similar complaints were received by other faculty members. (Brown, G-50; Eckhardt, G-77; Wenger, G-113; Harlan, H-8; McFarlane, DX-23, p. 14). There is also record evidence from students demonstrating dissatisfaction with his teaching performance. (Dykes, G-84). There is also evidence indicating that the enrollment in Scott's "American Minorities" course fell from 85 to 5 over the three years Scott taught at the Unversity. (Scarpitti, F-90).

"bummer". Finally, 81.2% said they would not recommend Scott as a professor.

With respect to service activity, the Chairman's evaluation in 1972 acknowledges that he was engaging in a great deal of service activity both on and off the campus. Among other activities Scott served as Chairman of the Education Committee of the Wilmington Branch of the NAACP. (Scott, B-101).

B. *Nohara.*

Dr. Shigeo Nohara, who is of Japanese descent, was hired as an Assistant Professor in the Sociology Department in 1965. (PX-17). At that time, the Department was dedicated to teaching and there was no requirement of scholarship or service. (Scarpitti, F-95). Nohara was given a three year contract in 1965. During this period he carried a 12 hour load of undergraduate teaching. In the spring of 1967, he was renewed for a second three year term. (Scarpitti, F-149). After his renewal in the fall of 1967, the previously described change in the policy of the department began. (Scarpitti, F-97, F-150). Even after 1967, however, Nohara had a heavy teaching load which was not lessened until the fall of 1969. (Scarpitti, F-152). When the time came for another decision on Nohara's faculty status, in April of 1970, he was given a new two year contract to permit him to work on a substantial research project which he had underway at the time. (DX-455). When his scholarship record did not improve significantly during the additional two years, Nohara was terminated. (Scarpitti, F-97; DX-456).

C. *Black.*

William Black, a white, was hired as an Instructor in the English Department in 1968. (PX-28). He was renewed at that position in 1969 and 1970. (PX-28; Sanchez, A-25). In 1971, after he received his doctorate degree, he was promoted to Assistant Professor on a three-year contract. (Bohner, H-55). The record shows that Black was highly regarded as a teacher. (Sanchez, A-24; Bohner, H-60). However, his scholarship record lacked quality. (Bohner, H-59). When he came up for renewal as an

Assistant Professor, he was automatically renewed by the senior faculty members under then existing rules of the English Department. (Bohner, H-56). This renewal was vetoed by University officials, however, because he had already been on the faculty for six years. (Bohner, H-58). Black was then given a one year contract. (Bohner, H-58; PX-30). When he showed no improvement in scholarship during that year he was given a terminal contract. (Sanchez, A-25; PX-32; Bohner, H-59).

D. *Reddington.*

Dr. John Reddington, who is white, was hired in the English Department in 1965 or 1966 on a three year contract. (Bohner, H-60). Under the English Department policy noted above, he was automatically renewed for a second three year term. When his research activity did not prove satisfactory in reviews in both his fifth and sixth years (Bohner, H-78), Reddington was terminated. (Bohner, H-60; Sanchez, A-23).

E. *Kepka.*

Dr. E. J. Kepka, who is white, was hired as an Assistant professor of Educational Foundations in 1971. (PX-27; Mosberg, L-74). He was evaluated in his second year and not renewed becasue of a poor teaching record and his lack of research. (Mosberg, L-74). In his third year, when he showed little improvement, he was again denied renewal. (Mosberg, L-75). He was then given a terminal contract. He was later given a third opportunity for evaluation. (Mosberg, L-75). He declined that opportunity and resigned from the faculty. (Sanchez, A-24).

F. *Analysis.*

The ultimate decision to be made in any racial discrimination case where the plaintiff makes a claim of disparate treatment is whether it is reasonable to infer from all the evidence that the challenged action was based in whole or in part upon race.[48]

48. This is true whether the action arises under Title VII, 42 U.S.C. § 1981, or 42 U.S.C. § 1983. *See, e.g., McDonald v. Santa Fe Trail Transportation Co., supra,* which arose under both Title VII and Section 1981.

Hence, the question is whether the non-renewal of Scott's contract or the failure to reevaluate him in his third year was based in whole or in part on his race. If the non-racially based reasons advanced for these actions (or failure to act) were in fact what occasioned them, there is no basis for liability on the disparate treatment claim. If they were mere pretext, however, for a racially motivated decision, relief must be fashioned. *Furnco Construction Corporation v. Waters, — U.S. — , 98, S.Ct. 2943, 57 L.Ed.2d 957 (1978); McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

This focus must be kept in mind in determining how much similarity between the situations of different faculty members make them "comparable" for purposes of applying the doctrine of *McDonald* and *McDonnell Douglas.* These cases speak of ways "to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."[49] The closer the situations of two employees of different races who are treated differently, the more compelling is the inference that race played a role in the disparate treatment. But the ultimate question is whether, drawing the reasonable inferences from all the evidence, it appears that the plaintiff was treated differently from other employees due to his race.

Based on all the evidence, I conclude that the failure of the University to renew Scott's contract resulted from the opinion of nine members of the Sociology Department that he was not, and would not develop into, an acceptable permanent professional colleague. This opinion was based primarily on what they considered to be a demonstrated lack of interest in pursuing the kind of scholarship, research and writing which they thought to be significant, and secondarily, on the view that one with the teaching experience which Scott had should have developed

49. *Furnco Construction Corporation v. Waters,* — U.S. at — , 98 S.Ct. at 2949.

greater effectiveness in relating with students. As far as the failure to reevaluate Dr. Scott at the end of his third year is concerned, I conclude that no evaluation took place because one was not requested and because the situation had not materially altered since the time of the evaluation at the end of his second year.

I base these conclusions on the testimony of the members of the Sociology Department and other evidence which tends to confirm the credibility of their testimony. Eight colleagues of Dr. Scott testified,[50] including six of the nine who voted not to renew his contract and one of the two who abstained. Each testified about his own contact with Dr. Scott and of his opinion regarding Scott's teaching, scholarship, and service. The uniform view, which I accept as an accurate reflection of the opinions which motivated the non-renewal decision, was that Scott was not the kind of "sociologist's sociologist" the department was looking for. He appeared to lack either the interest or discipline ncessary to do the kind of research and publication that they were interested in and, indeed, Scott recognized this at the time. (Finner, F-188, G-6; Brown, G-48; Eckhardt, G-76; Harlan, H-9; Dynes, H-24; McFArlane, DX-23, p. 14). In February of 1973, for example, he told Professor James (who was then seeking a job at the University) that he did not feel his interests matched the Univesity's and the Department's interests and that he did not perceive himself as writing the kind of scholarly journal articles that were required.[51] While some of Scott's colleagues felt that his

50. Scarpitti, Finner, Brown, Eckhardt, Wenger, Harlan, Dynes and McFarlane, by deposition. Professor James, a ninth colleague, also testified. However, he did not join the faculty until September of 1973, after the decision not to renew Scott had already been made. (James, G-102).

51. Dr. James testified:

Q Did you talk about what would be expected of you as an Assistant Professor at the University of Delaware if you were able to come?

A Yes, we did.

Q And what did Dr. Scott tell you?

A He indicated to me that the department and the University both, in his estimation, were very interested in scholarly publication of the type in our professional journals.

Q What else did he say?

teaching had improved during his stay at the University, they believed it was substantially below what should be expected for the amount of his experience. (Brown, G-48; Harlan, H-8). Finally, while they acknowledged Scott's interest in community service, some considered the service concept to relate solely to making one's professional skills available to the community and did not feel that Scott was serving the community in the capacity of a sociologist.[52] (Brown, G-73; McFarlane, DX-23, pp. 40-41).

This testimony of Scott's colleagues is consistent with the other evidence concerning Scott, and the Sociology Department and its members. The record shows, for example, that a number of these men had backgrounds in the civil rights movement and elsewhere which vouch for their concern about equal rights. (Scarpitti, F-25; Finner, F-181; Brown, G-31-32). Dr. Scarpitti, who was then providing the leadership of the Department, had demonstrated his concern in the race relations area in a number of concrete ways. When Scott was hired by a vote of the Department only two years earlier, in preference to two white candidates who were also considered qualified, we know that his race, as well as his extended prior teaching experience, weighed heavily in his favor. (Brown, G-49). When he arrived on campus, he was graciously received and thereafter continued to enjoy a

A That promotion or retention would be impossible without that, and that he did not feel that his interests matched what the University's and the department's interests were. That is, he did not perceive himself as writing the kind of scholarly journal articles that were required.

Q Did he perceive that as affecting his continued employment at the University?

A Yes, he did.

Q What did he say about that?

A He indicated that in his judgment it would be unlikely that he would be able to stay at the University of Delaware for too long, given the discrepancy between his interests in his work and the University's expectations.

Q Expectations with regard to scholarship and publication?

A Right.

(G-104-5).

52. The one faculty member who voted for a contract extension did so, not on the basis of past performance, but rather on the basis that Dr. Scott should be granted more time for improvement. (McFarlane, DX-23, pp. 36, 39).

social relationship with several members of the Department. (Scarpitti, F-48-50). It is also true, however, that Dr. Scott arrived at a time when a change in departmental philosophy was bringing very heavy emphasis to the area of scholarship. And, finally, we know that, whatever may be the accuracy of their evaluation, these men had received information supporting the views which they expressed regarding Scott's scholarship and teaching effectiveness.

Against this background, plaintiff's "comparative" evidence is unpersuasive. While it is true that Black, Reddington and Kepka were given significantly greater opportunities for reevaluation, there are rational explanations for this which are unrelated to race. The practices in the English Department and in the Department of Educational Foundations at the times of their renewals were simply different than the practice of the Sociology Department in 1973. There is nothing in the record to suggest that the differences in procedures between departments were somehow a mask for discrimination, and nothing in Title VII nor the Civil Rights Acts requires that all academic departments of a university operate in the same manner.

Nor do I find the evidence with respect to Dr. Nohara indicative of racial discrimination against Dr. Scott. Dr. Nohara was hired and initially renewed at a time when the Sociology Department's sole criteria for renewal was teaching. Even after this policy changed in 1967, Nohara had a very heavy teaching load until 1969, and could not reasonably be expected to embark upon any meaningful research. When he came up for another renewal decision in 1970, the faculty felt it would be unfair to hold him to the Department's new research and scholarship requirements, which he had not yet been given an opportunity to achieve. In addition, he had a major research project underway at that time. When, after two years, Nohara did not show adequate research achievement, he was terminated. Since Nohara had been hired under a renewal system far different from that Scott was hired under, and since he had a heavier teaching responsibility, a comparison between the two does not suggest that the failure to

afford Scott the same opportunities for improvement was racially motivated.

There is still another reason why Scott was not similarly situated with the other four faculty members whom he cites and why his lack of opportunity for improvement and reevaluation do not indicate discriminatory treatment. At the time that Scott was hired at the University, he had been a full time faculty member at other institutions for eight years. There is no evidence that any of the other four faculty members had similar experience. In fact, it is clear that neither Black nor Nohara had any prior full time[53] teaching experience before they were hired by the University. (PX-17, PX-29). I cannot find disparate treatment when faculty members without any previous experience are given opportunities to improve their teaching an develop their research, which experienced faculty members are not afforded.[54]

Besides the comparative evidence just discussed, plaintiff sets forth a list of miscellaneous supportive evidence indicating discrimination against Scott. I do not believe, however, that any of this evidence fairly leads to the conclusion that Scott was not renewed, or that he was not given an opportunity for improvement, for racial reasons. These pieces of evidence include the receipt by Scott of hate mail, some clearly racially motivated. (Scott, B-79; PX-14), a student complaint that Scott was seen lying drunk on the ground with a whiskey bottle in his hand, (Scott, B-85; DX-11, 12; PX-25), and a remark by Dr. DiRenzo of the Sociology Department at a 1971 faculty meeting referring

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53. Black had been a graduate teaching assistant at Duke University for two years.

54. Scott's brief emphasizes that he is the only Assistant Professor of Sociology since Scarpitti came to the campus in 1967 who was not renewed at the end of an initial three year contract. Significantly, however, he does not compare his experience and credentials with any member of the Sociology Department, other than Nohara, who was renewed after three years. As indicated in the text, Nohara's case is not comparable to that of Scott.

to the hiring of Scott and using the words "window dressing".[55] (Scott, B-89; Scarpitti, F-52; Dynes, H-25; Sanchez, A-26). While some of this evidence is indicative of racial prejudice on the University campus, it does not suggest to me that Scott was a victim of racial discrimination by the University in its renewal process, or that he was treated differently than non-black faculty by the University.

Dr. Scott's disparate treatment claim is without merit.

III. The Disparate Impact Claim.

Plaintiff asserts on behalf of the class that the employment practices of the University have had, and continue to have, a disparate impact upon blacks in the areas of hiring, contract renewal, promotion and tenure. This Court is asked to declare these practices to be in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and the Civil Rights Acts of 1966 and 1871, 42 U.S.C. §§ 1981 and 1983. The relief which plaintiff seeks is an order requiring that one of every three new faculty hires at all levels at the University (e. g. Assistant Professor, Associate Professor, etc.) shall be black until such time as blacks make up 12.5% of the total faculty.[56]

Plaintiff makes two arguments in support of his claim of disparate impact. First, is it said that the University's use of a doctoral degree criterion has a disparate impact upon blacks which is not justified by the legitimate needs of the University. Second it is argued that, even assuming the validity of this educational degree criterion, the decentralization and subjectiveness of the decisional process in the areas of hiring, renewal, and advancement have the overall effect of putting black candidates at a disadvantage.

The Supreme Court recently reviewed the controlling

55. DiRenzo abstained in the vote on Scott's renewal (Scarpitti, F-86; Scott, B-173). He also attempted to apologize to Scott for his remark. (Scott, B-169). The rest of the department faculty did so apologize. (DX-99).

56. No damages attributable to present or past effects of discrimination are sought.

principles and the trial burdens in Title VII disparate impact cases in *Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977):

> [The] . . . cases make clear that to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminartory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, supra, 401 U.S. 424 at 432 [91 S.Ct. 849, 28 L.Ed.2d 158]. If the employer proves that the challenged requirements are job related, the plaintiff may the show that other selection devices without a similar discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship'." *Albemarle Paper Co. v. Moody*, supra, 422 U.S. 405, at 425, [95 S.Ct. 2362, 45 L.Ed.2d 280] quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, [93 S.Ct. 1817, 36 L.Ed.2d 668].

In order for a plaintiff to prevail in a Section 1983 discrimination claim, there must be not only a discriminatory effect, but discriminatory intent on the part of the state officials as well. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Since I am not persuaded that any of the challenged practices have been instituted or maintained for the purpose of adversely affecting blacks, the plaintiff's claim under that section may be eliminated at the outset.

The question of whether Section 1981 also requires a showing of discriminatory intent is an open one.[57] *Richardson v. Pennsylvania Department of Health*, 561 F.2d 489, 493 (3rd Cir. 1977). For present purposes, however, I will assume that Section 1981, like Title VII does not require discriminatory intent.

57. The Supreme Court has granted certiorari in a case which presents this issue. *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *cert. granted — U.S. — , 98 S.Ct. 3087, 57 L.Ed.2d 1132 (1978).*

A. *The Ph.D. Or Its Equivalent Criterion.*

A "Ph.D. degree (or its equivalent)" is a prerequisite for appointment or promotion to most of the Assistant Professor, Associate Professor and Professor positions at the University. It is clear that this requirement currently has a disparate impact upon blacks. The balck percentage of those holding Ph.D. degrees in the disciplines taught at the University is substantially lower than the black percentage of those holding Master's degrees and Bachelor's degrees in those disciplines. Thus, if the University utilized an inflexible Ph.D. requirement, it would necessarily affect blacks adversely. While the University does utilize an equivalency concept, this modification does not eliminate the disparate impact. I reach this conclusion because the black percentage of those either holding Ph.D. degrees in the relevant disciplines or possessing the kind of experience which the University accepts as equivalent is also undoubtedly less than the black percentage of those holding Master's and Bachelor's degrees or the equivalent in those disciplines.[58]

The remaining questions are (1) whether the University has justified its degree requirement by showing that it has a "manifest relationship" to the responsibilities of a full time faculty member and, if so, (2) whether the plaintiff has shown that some other criterion or selection procedure with less of a disparate impact upon blacks would serve the University's legitimate interests as well.[59] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *McDonnell Douglas v. Green*, 411 U.S.

58. I conclude that this showing of a disparity between the black participation is the qualified pool when the degree requirement is utilized and when it is not constitutes a prima facie case. Cf. Dothard v. Rawlinson, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). *But see Townsend v. Nassau County Medical Center*, 558 F.2d 117 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1015, 98 S.Ct. 732, 54 L.Ed.2d 759 (1978).

59. It is incombent upon the plaintiff to at least identify an alternative selection procedure which he or she claims wuld have less of a disparate impact and would serve the employer's legitimate interest as well. *EEOC v. DuPont*, 445 F.Supp. 223, 264 (D.Del.1978); *Crockett v. Green*, 388 F.Supp. 912, 920 (E.D. Wis. 1975), *aff'd* 534 F.2d 715 (7th Cir. 1976).

792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).

While the evidence on the question of justification is surprisingly sparse, it is fair to say that the record offers two rationales for the "Ph.D. or it equivalent" requirement. The first and foremost of these rationales is that the experience, knowledge and skills acquired in obtaining a Ph.D. are reasonably related to the ability to do research, think creatively, and add to the existing fund of knowledge through publication and other communication in one's chosen field. This scholarship function is crucial to the University, it is said, because a "true university . . . [is] concerned with the discovery or creation of knowledge as well as its transmission through teaching and service."[60] Thus, in the words of Dr. Scarpitti, the University views itself as being "in the business of creating knowledge as well as in the business of disseminating knowledge."[61] Moreover, involvement in "the business of creating knowledge" is viewed not only as valuable in itself but also as a means of keeping a faculty member's teaching "alive and current".[62]

The second rationale is that the Ph.D. experience or its equivalent is reasonably related to an ability to teach graduate students, it being desirable for those teaching to have more extensive academic training than those being taught. This rationale is reflected in the Physical Education Department, for example, where there were twenty-four positions which involved the teaching of graduate students had a Ph.D. degree requirement as a matter of Department practice. (Brown, K-53).

I do not understand the plaintiff or the EEOC[63] to maintain

60. DX-52.

61. Scarpitti, F-98.

62. PX-88, p. 4-7.

63. The EEOC filed a brief and submitted oral argument as an amicus curiae.

that a Ph.D. degree in a particular discipline is not highly correlated with, and predictive of, the ability to teach graduate students in that discipline. Nor do I understand either to say that a Ph.D. degree in a particular discipline is not highly correlated with, and predictive of, the ability to engage successfully in scholarly research and writing which will add to the fund of knowledge in that discipline.[64] Thus, this is not a case like *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), where the court found that a high school diploma requirement had not been "shown to bear a demonstrable relationship to successful performance of" jobs in a power generating facility. 401 U.S. at 431, 91 S.Ct. at 853.

What I do understand the plaintiff and the EEOC to maintain, with support from the plaintiff's expert witness, is (1) that one doesn't need a Ph.D. or its equivalent to teach undergraduate students and the teaching of many, if not most, of the full time faculty members at the University is limited to undergraduates, and (2) that, even in the context of teaching graduate students or pursuing scholarly activities, some individuals have other kinds of experience which makes them as valuable as a Ph.D. holder. Accordingly, they contend that the Ph.D. requirement should not be applied to as many faculty positions as it is at the University and that even where the requirement is properly

64. Plaintiff does argue that relief should be awarded because the University has not "validated" the Ph.D. or equivalent requirement in accordance with 29 C.F.R. § 1607.1 *et seq.* The EEOC initially suggested at oral argument that such formal validation is not necessary in this context, but ultimately declined to take a position on the issue. While there regulations can be read to apply to a Ph.D. or equivalent requirement, the Supreme Court has interpreted them in a manner inconsistent with plaintiff's contention, *Griggs v. Duke Power Co., supra,* 401 U.S. at 433 n. 8, 91 S.Ct. 849, and courts considering challenges to objective educational job criteria have generally not required validation in the manner there required. *E. g., Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50 (8th Cir. 1977); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972); *Castro v. Beecher,* 459 F.2d 725 (1st Cir. 1972); *League of United Latin American Citizens v. City of Santa Ana,* 410 F.Supp. 873 (C.D.Cal.1976). But, even if there be a requirement as to the character of the evidence necessary to demonstrate job relatedness in a case where that issue is seriously disputed, it would elevate from over substance to require empirical test data in a case where there is no such dispute.

applied as a general rule, it should be flexible.

The suggestion that the Ph.D. or equivalent requirement be eliminated for teachers of undergraduate students ignores a substantial part of the responsibility of a member of the University faculty. The University regards the expansion of knowledge as one of its primary missions and requires scholarship activity from virtually all of its faculty.[65] While plaintiff is critical of the emphasis currently being placed on scholarly research and publication by the University, the University's choice of mission is not a subject for judicial review. The purpose of Title VII is not to dictate what the function or business of an institution will be or what tasks and responsibilities its employees will undertake. Its sole purpose is to eliminate employment discrimination against the classes which it protects and what it precludes is hiring criteria which have a disparate impact on a protected class and which do not bear a demonstrable relationship to responsibilities of their position, whatever they may be.

Turning to plaintiff's suggestion regarding increased flexibility in the application of the degree requirement, it is, of course, true that one may succeed in scholarship and graduate teaching without a Ph.D. degree. But the record indicates that the University has recognized this fact in the formulation of its employment criteria by inclusion of the "equivalency" proviso. It demonstrates, as well, that full time faculty members are hired and retained at positions above the instructor level without having a Ph.D. degree. While plaintiff argues that the University's application of its educational criterion is less flexible

65. PX-88, Handbook For Faculty at p. 4-7. The University of Delaware is, of course, not alone in considering the expansion of knowledge as part of its function and scholarshipas part of the responsibility of a faculty member. The record shows that most colleges and universities in the country use scholarship as one of the criteria for hiring, promotion and tenure. The record also shows that these institutions pay a significant premium for holders of Ph.D.'s. This would appear to reflect a general judgment in the academic community that there is a high correlation between receipt of a Ph.D. and the demands of a faculty position.

in practice than required by the legitimate University interest which supports it, this is difficult to reconcile with the record.[66] The evidence with respect to the application of the "equivalency" concepts at the University of Delaware suggests that its practice does not differ materially from the practices at the University of Massachusetts[67] and Brooklyn College[68] which plaintiff's experts recommend as having the kind of flexible degree requirements which are desirable. The application of the equivalency concept at these institutions has produced full time faculties which have a 75% Ph.D. population.[69] This is slightly higher than the 73% Ph.D. population at the University of Delaware.[70]

In summary, while the "Ph.D. or its equivalent" requirement probably has a disparate impact upon blacks, I conclude (1) that this disparate impact is justified by the legitimate interest of the University in hiring and advancing persons who are likely to be successful in adding to the fund of knowledge in their chosen disciplines and effective in the teaching of graduate students in those disciplines, and (2) that plaintiff has suggested no altenative criterion or selection procedure which would serve that interest as well with less potential for adverse effect on blacks.

B. *Subjectivity And Decentralization In Hiring.*

1. *The Title VII claim.*

The provisions of Title VII were not applicable to the

66. The evidence concerning the black segment of the faculty, for example, indicates that the degree requirements are applied with considerable flexibility. Two of the three black instrucotrs on roll at the time of trial did not have Master's degrees and three out of the nine blacks then holding higher ranks did not have their Ph.D. degrees. Thus, only six of the twelve black full time faculty members held Ph.D.'s.

67. Blackwell, C-90-93.

68. Lee, D-28-30.

69. See Blackwell, C-22; Lee, D-37.

70. Plaintiff's expert testified that nationally only 58% of all faculty members hold Ph.D. degrees. He also testified, however, that this figure reflects institutions which differ widely in mission from the University of Delaware. It includes community colleges, for example, and less than 10% of the new hires at such institutions hold Ph.D. degrees. (Blackwell, C-22-23).

University until March 24, 1972, the effective date of the 1972 Amendments to that Act. Thus, as far as the Title VII discrimination in hiring claim is concerned, the task is to determine whether the hiring practices of the University have had a disparate impact at any time between March of 1972 and the present. *Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1976).[71]

I have found that at the time of trial there were twelve full time black faculty members out of a total full time faculty of 818. This represents 1.46%. I have also found that the appropriate hiring pool is approximately 2.55% black. Dr. Siskin testified that, given this pool, the probability of finding twelve or less blacks among a faculty of 818, if race were not a factor in the selection process, would be only 3%. This is statistically significant under the EEOC guidelines and the decisional law.[72] Alternatively, looking at this data in terms of the statistical analysis suggested by the Supreme Court in *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), n. 17, given a pool which is 2.55% black, one would expect to find 20.86 blacks on a faculty of 818. This expected value is 8.86 higher than the observed value of twelve and the standard deviation is approximately 4.5. Thus, the observed value is about 1.97 standard deviations less than the expected value.[73]

This data provides a rational basis for an inference that the University's hiring process has a disparate impact upon blacks and plaintiff has, accordingly, established a prima facie case.

71. While not of controlling significance under the Court's view of the facts, the Title VII class should have been limited to those who could have filed a charge with the EEOC on September 21, 1973 (the date Scott filed his charge), that is, those who applied, or but for the discriminatory practices would have applied, within 180 days preceding September 21, 1973, i. e. after March of 1973. *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239 (3rd Cir.). *cert. denied* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975).

72. 29 C.F.R. § 1607.5 recognizes anything under 5% as statistically significant.

73. A differential of 1.65 standard divisions in *Castaneda* terms is the equivalent of 5% in terms of the analysis reflected in 29 C.F.R. § 1607.5.

Hazelwood School District v. United States, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). The ultimate question as to whether the University's hiring practices adversely affect blacks, however, must be answered in light of all of the evidence, both statistical and non-statistical. *EEOC v. DuPont,* 455 F.Supp. 223 (D.Del. 1978).

There is other statistical data available which is helpful in determining the significance of the data comprising plaintiff's prima facie case. The relevant question is whether the University's post-Act hiring practices have adversely affected blacks. The record shows that the last elections with respect to a significant number of full time faculty positions were made at a time when different employment practices prevailed. Thus, for example, it is clear that a substantial segment of the 818 positions on the full time faculty in 1976-77 were last filled before 1965, thirteen years ago. The University's experience with filling these positions is of limited value in determining whether the University's current employment practice adversely affects blacks.[74] While the record does not disclose exactly how many of the 818 faculty members were hired prior to 1965, Dr. Siskin testified that there were 275 tenured faculty members in the 1975-76 school year and that 42%, or 115, of them had been hired prior to 1965. (Siskin, E-100). While some of these 115 may have retired and been replaced at the end of the 1975-76 school year, it is reasonable to expect thta at least 100 of the 818 faculty members during the 1976-77 school year were hired in 1965 or before. If this segment of the sample (which included no blacks) is eliminated and one assumes a total population of 718 faculty positions available, the expected value, using a 2.55% black pool, would be 18.3 black facutly members. This is less than one and one-half standard deviations above the observed value of 12.[75]

74. As noted earlier, the University hired its first full time black faculty member in 1965.

75. Under the formula set out in *Castaneda v. Partida, supra,* the standard deviation is about 4.2.

This exclusion of an irrelevant portion of plaintiff's sample thus substantially weakens the inference which he seeks to draw.[76]

Moreover, plaintiff's prima facie statistical case involved static figures, as contrasted with what might be called hiring flow data which generally are of greater probative value in assessing disparate impact in hiring. While the record unfortunately does not contain complete hiring flow data, there are some helpful figures in this area. It will be recalled that an Affirmative Action Sign-Off Form approved by the Coordinator was a prerequisite to making an offer of full time employment. The forms filed during the four year period from 1973-4 to 1976-7 (DX-91, 98, 105-448) show a total of 303 formal offers for full time faculty positions. They also show that 6, or 1.98%, of those offers were made to and accepted by blacks. (DX-136, 145, 153, 154, 273, 444). Assuming an availability pool which was 2.55% black, one would expect to have 7.73 offers to blacks, rather than 6. Using the *Castaneda* formula, the observed value is less than 1 standard deviation less than the expected value.[77] This means that the available flow data on hiring offers does not provide a statistically significant indication of adverse impact.[78]

Finally, there is one other source of statistical data which I find to be significant, particularly when viewed in the light of the non-statistical evidence. The record indicates that approximately

76. Dr. Siskin testified that excluding 150 non-black faculty members from the population, the probability that race was not a factor in the selection process would be 9.9%, which is not signigicant under 29 C.F.R. § 1607.5 (Siskin, N-53).

77. Under the *Castaneda v. Partida* formula, the standard deviation is approximately 2.75. The observed value is 0.63 standard deviations less than the expected value.

78. *Castaneda v. Partida, supra,* 430 U.S. at 497, n. 17, 97 S.Ct. 1272. The Affirmative Action Sign-Off Forms provide other relevant data. There are a total of 55 forms reflecting situations in which there was at least one known black candidate for a full time faculty position. And it will be recalled that the hiring process selected a black for the position on six occasions or 10.9% of the time. While one needs to know more about the racial composition of the applicants for the positions which went to blacks in order to fully evaluate this data, it does tend to support the impression received from the non-statistical evidence that the University has sought out blacks.

75%[79] of the applicants for faculty positions from 1974 to sometime in the 1976-7 year returned "Applicant Supplemental Forms" (DX-59). These forms show that 1.78% of the applicants returning them indicated that they were black. While it would be desirable to have follow-up data which would confirm whether the 1.78% black applicant rate in the 75% sample is indicative of the entire sample, the absence of such follow-up data does not deprive the data of probative value. No reason was suggested by an expert why one would expect a higher proportion of black non-responses than non-black non-responses, and I can perceive none. These data suggest (a) that the percentage of blacks among those applying to the University for full time faculty employment is somewhat lower than the percentage of blacks in the available labor pool and (b) that the University's black hiring rate corresponds quite closely with the rate at which blacks are applying for such employment.

In summary, the limited applicant flow data and hiring flow data available do not support the inference of disparate impact on blacks. On the other hand, the static work force data cited by Dr. Siskin and the applicant supplemental form data do provide some support for Dr. Siskin's opinion that "there is something in the process of selecting new full time faculty which relates to race". Even if this hypothesis be accepted, however, one must further ask what it is in the process which is related to race. There are three possibilities. First, it could be that the University's methods of recruitment, i. e., the dissemination of information about faculty vacancies, result in a low level of black exposure. Second, it could be that the decision-makers choose non-black candidates from the applicant pool at a rate disproportionate to their numbers. Finally, it could be that black academic candidates are able to choose among a number of employment opportunities and that a lower proportion of qualified blacks than qualified whites views the University of Delaware as a desirable place to be a faculty member. To the extent that a factor

79. 5171 of 6876.

related to race does play a role in the selection of full time faculty at the University, the most reasonable reconciliation of all of the evidence, statistical and non-statistical, is that the third hypothesis is the correct one.

Since its inauguration in 1972, the Affirmative Action Program has provided a procedure designed to inform the black academic community regarding the University's faculty needs, the resource information necessary to implement that procedure, and a system to monitor compliance. While there have been isolated instances since 1972 when the procedure was not followed, as earlier noted, I am persuaded that the Affirmative Action Program has been generally honored by the faculty and that the black academics have in fact learned of openings at the University when they have occurred.

Turning to the selection process, it is true that the criteria utilized in the hiring of faculty are subjective and that they are applied on a decentralized basis.[80] However, these facets of the hiring process have not resulted in a disparate impact upon blacks. The Court has heard testimony concerning most of the 55 instances between 1972 and trial in which blacks were known to have been involved as candidates for full time faculty positions. Plausible, non-racially based, explanations were offered in those instances in which non-blacks were selected over blacks and the credibility of this testimony receives support from a review of the

80. Neither subjectivity nor decentralization of decision-making, of course, constitutes a per se violation of Title VII. The courts have recognized on numerous occasions, for example, that employment criteria for faculty appointments are necessarily subjective. *E. g., Sweeney v. Board of Trustees of Keene College,* 569 F.2d 169, 176 (1st Cir. 1978); *Peters v. Middlebury College,* 409 F.Supp. 857, 868 (D.Vt.1976); *Lewis v. Chicago State College,* 299 F.Supp. 1357, 1359 (N.D.Ill. 1969). Similarly, it is to be expected that those best able to judge the professional qualification of a potential faculty member, i. e., those trained in his or her discipline, will play an important role in the decision-making process at any institution of higher learning. I need not decide, however, whether the degree of subjectivity and decentralization found in the hiring process at the University is justified by legitimate institutional interests. Only disparate impact needs to be so justified, and the record in this case does not suggest that the selection process at the University in fact operates to the disadvantage of blacks.

contemporaneously prepared and reviewed Affirmative Action Sign-Off Sheets. In addition, the record reflects numerous instances where extraordinary efforts were made to secure the services of blacks by offering preferred terms of employment and through other means. There is also evidence that when individual departments have been found wanting in their efforts to secure black representation on their faculties, the University administration has brought effective pressure to bear in order to achieve a response.

Lending further support to the hypothesis that the hiring procedures in the post-Act period have not been tainted with racial bias is a very significant gap in plaintiffs' evidence. Despite the voluminous testimony in this case, not one individual has been identified who claims to have been discriminated against in the hiring process on grounds of race, and, as earlier indicated, at least one of plaintiff's witnesses familiar with the University scene over a substantial period of time testified that he knew of no black who had been interested in employment with the University and who had been unfairly denied a job opportunity. While I realize that a plaintiff in a disparate impact case is entitled to rely solely on statistics, the absence of any identified victim is nevertheless significant.

Based on the record as a whole, I think it highly unlikely that the University's subjective employment criteria and its decentralized decision-making process have resulted in blacks being adversely affected by the selection process.

The evidence which tends to negate the first two possible explanations for the University's underutilization of black faculty inferentially supports the validity of the third explanation. Three other categories of evidence provide support for this hypothesis as well. First, plaintiff's lay witnesses who testified as to the University's reputation in the black community and as to the difficulties of attracting black faculty members prior to achieving a "critical mass" clearly established that black academics generally have not viewed the University as an appealing employment location. Second, defendants' witnesses

testified to numerous individual recruiting efforts which terminated in a black opting for another employment opportunity despite and offer or clear interest from the University. Finally, there was the data from the applicant supplemental forms which tends to show a significant gap, at least during 1974 and 1975, between the black applicant rate and the black percentage of the relevant labor pool. Having concluded that evidence of the University's hiring needs did reach all segments of the relevant pool, including the black segment, this evidence tends to confirm that black preference is responsible for the disparity between the black proportion of the University's full time faculty and the black proportion of the pool from which they have come.

Based on all the evidence pertaining to the post-Act period, I conclude that the University's hiring practices did not adversely affect blacks during that period.

2. *The Section 1981 claim.*

Having made the assumption that Section 1981 does not require a showing of discriminatory intent as a prerequisite to liability, the principal effect of plaintiff's reliance on Section 1981[81] is to extend the scope of the search for disparate impact back to March 22, 1971. This suit was filed on March 22, 1974 and Section 1981 claims arising in Delaware are governed by a three year statute of limitations.[82] Thus, in order to establish a

81. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

82. While plaintiff relies upon evidence relating to the mid-60's and earlier periods as circumstantial evidence supporting his claim that there has been a continuing pattern of intentional discrimination in hiring in the 70's, both he and the EEOC agree that the Section 1981 claim is subject to he three year limitations period prescribed by 10 Del. C. § 8106, and the evidence regarding those earlier periods is not relied upon as an independent basis for relief. *See Marshall v. Electric Hose & Rubber Company*, 68 F.R.D. 287 (D.De.1975) and *Guilday v. Department of Justice*, 451 F.Supp. 717 (D.Del.1978) (10 Del. C. § 8106 applicable to Section 1981 employment discrimination claim).

right to relief it is necessary to show that an employment system which adversely affected blacks was in existence on or after March 22, 1971.[83]

The record indicates that the hiring procedures utilized during 1971 and the first few months of 1972 were not the same as those in the Title VII period. It does not suggest, however, that those procedures had a disparate impact or that blacks were otherwise denied equal employment opportunity during that period.

During the school year 1970-71, the affirmative action procedures which prevailed in the Title VII period had not yet been instituted. The record demonstrates, however, that by that year substantial changes had been made in the system which had produced no black faculty members prior to 1965 and only four black faculty members prior to September of 1968. As earlier recounted, in 1968, the administration made it clear to the members of the academic community generally that it was serious about hiring black faculty and solicited the aid of all the members of its own community to that end. This commitment had begun to bear tangible fruit by 1970-71. We know from Dr. Scott's experience and that involving Dr. Hall's recruitment that special effort and preference was being accorded black candidates in 1971 to induce them to come to the University. Moreover, the new faculty hired in one year are ordinarily recruited during the preceding year and, it is, therefore, reasonable to infer that the six blacks hired for positions on the 1971-72 faculty were offered positions and persuaded to accept

83. *E. g., Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). An employment practice which is racially neutral in its operation during the statutory period may, of course, have an adverse impact during that peiod if it perpetuates the effects of past discrimination. A hiring procedure which affords equal opportunity to blacks and which communicates that fact to the appropriate black community, however, does not perpetuate the adverse effect of a prior hiring practice which may not have afforded such opportunity.

them in 1970-71.[84]

While the procedures used in the year preceding the adoption of the affirmative action program lacked some of the safeguards of the procedures in later years, given the productivity of the procedures utilized in the 1970-71 school year and the evidence of the preferences accorded blacks at that time, I am unwilling to conclude that these procedures had a disparate impact upon blacks.

C. *Subjectivity and decentralization—renewal, promotion and tenure.*

The University's tenure, promotion and renewal practices, like its hiring procedures, involve subjective criteria and decentralized decision making. As with hiring, it is difficult to imagine procedures in these areas for an institution of higher learning which would not have these two characteristics. As earlier detailed, however, the various departments have substantially reduced the opportunity for discrimination by specifying how the more general criteria will be applied. Also as earlier noted, there is centralized review of departmental policy statements and of individual departmental recommendations. The limited evidence in the record reflecting the application of these procedures does not suggest that they have a disparate impact on blacks.

Dr. Siskin testified that, assuming a pool which is 2.55% black, the probability of finding two or less tenured black faculty members out of a total tenured faculty of 314 is 4.9%. It also appears that in 1976, 44.4% of the white faculty had tenure, while only 16.7% of the black faculty was tenured. These statistics have little probative value, however, in trying to assess whether the procedures for conferring tenure have a disparate impact. Tenure

84. While we do not know the total number of faculty members of all races hired in the 1970-71 school year, we do know that it was not a year of major growth in the size of the faculty (there was an increase of 30). We also know that six black hires in one year compares favorably with the productivity in the years of the affirmative action found not to have had a disparate impact.

is almost always conferred upon people who are already on the University's faculty and who have been there for three to six years.[85] Accordingly, one must look to the University faculty as the primary pool and consider the experiences of black faculty members as contrasted with those of non-blacks.

Of the twelve black full time faculty at the time of trial, two were tenured and two were on the verge of being tenured. Of the remaining eight black faculty members, only four had been on the faculty for three years. Of these four, Gregory and Miles had only Bachelor's degrees, and Farrow and Washington had only Master's degrees. Thus, every black faculty member with a doctorate and with three or more years of service at the University was tenured or near tenure.[86] The only other black faculty members who have stayed at the University for more than three years in the past were Hilda Davis, a Ph.D. in Sociology, who had a special function in the Writing Center of the English Department, and Mary Farrell, who had only a Master's degree, and who was recommended for promotion (though not tenure) when she left the University in 1974. In addition, the University has attempted to hire Doctors Eubanks and Colson into tenured positions on its faculty.

The record on promotions is too sketchy to draw any inference. All we know is that there were some promotions of black faculty and that the EEOC found that two of the three blacks who became eligible for promotion between 1972 and 1975 were promoted.

Finally, with respect to renewals, there is no evidence of any black faculty member other than Dr. Scott who has not had his contract renewed. Indeed, no faculty member other than Dr. Scott is identified in the record as one claiming to be a victim of any racial discrimination in renewal, promotion or tenure at the University.

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85. The record suggests that more than three years, and often as many as six, are usually required before tenure is achieved.

86. In additon, Sills, who was close to tenure had only a Master's degree.

CONCLUSION.

As a part of its continuing Affirmative Action Program, the University committed itself in 1975 to attempt to hire a substantial number of new minority faculty members by 1980. Thus far, its efforts in pursuit of that goal have not borne the hoped for fruit. This may counsel review and change by the University. I conclude, however, that neither this shortfall nor the disparity between the percentage of blacks on the faculty and the percentage of blacks in the available pool is attributable to unjustified employment practices which have a disparate impact against blacks. Absent such impact, there is no occasion for judicial intervention. Since I also conclude that plaintiff has not been subjected to disparate treatment because of his race, judgment will be entered for the defendants.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2365

NOLVERT P. SCOTT, JR., etc.

v.

THE UNIVERSITY OF DELAWARE, et al.

NOLVERT P. SCOTT, JR.,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 74-0058)

Argued April 2, 1979

Before: ADAMS, HUNTER and GARTH, *Circuit Judges*

(Opinion filed June 6, 1979)

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OPINION OF THE COURT

GARTH, *Circuit Judge*

Dr. Nolvert P. Scott, Jr., a black former assistant professor at the University of Delaware, contended that the University discriminated on the basis of race in the hiring and promotion of its faculty members. He brought this action in the district court alleging claims under Title VII and the Civil Rights Acts of 1866 and 1871. Scott sought relief on his individual claims and on the claims of a class ocnsisting of prospective faculty members who might be discriminated against by the University's hiring practices and current faculty members subject to discrimination by the Unviersity's contract renewal, promotion, and tenure practices. The district court, after certifying the class action, found against Scott on both his individual and class claims. The issues before the district court are now presented to us on appeal.

We conclude that the district court properly ruled against Scott on his individual claims. With respect to the class claims, we hold that the class action should have been decertified, and thus do not reach the merits of the class action.

I. BACKGROUND.

Dr. Scott, who had only recently received his doctoral degree in sociology, was appointed an assistant professor in the University's Sociology Department in September, 1971. His previous experience included eight years of part-time graduate teaching assistant at Pennsylvania State University. During negotiations for his appointment ot the Sociology Department, he requested and received from the University a salary commitment of $15,000 during the first year of his three year contract. This was $3,000 above the rate at which the University normally compensated new faculty members in the Sociology Department who possessed doctoral degrees.

When new faculty members were appointed to the Sociology Department, they were provided with a mimeographed brochure describing the personnel policies of the department. This

brochure, originally published in 1969, described the criteria that would be considered in contract renewal, promotion, and tenure decisions:[1]

> The criteria fall into three general categories: 1) teaching effort and effectiveness, 2) scholarly activity, and 3) service to the department, the University, the community. Criteria in all three categories will be considered in formulating a recommendation.

The brochure thus served to inform new faculty members of the basic criteria that would be considered in contract renewal decisions.

During his discussions with the sociology faculty, Scott was informed that it was the general practice of the Department to evaluate candidates for contract renewal at the end of the second year of their three year contract. In this way, a candidate would receive one year's notice in the event his or her contract was not to be renewed. On May 1, 1973, the Sociology Department faculty met and reviewed Scott's performance, but concluded that Scott had produced inadequate evidence of research activity to permit a thorough evaluation of his work. As a consequence, Scott was asked to submit additional materials regarding his scholarly activities. On May 3, 1973, those members of the faculty in the Department who were senior to Scott met and, on the basis of Scott's supplemented record, recommended that his contract not be renewed. On May 8, 1973, the full Sociology Department met and voted against renewal 9 to 1, with 2 abstentions. Accordingly, Scott's employment with the University was terminated when his contract expired after the 1973-74 academic year. Scott then commenced this legal action. It was reported to this court at the time of oral argument on this appeal that on March 31, 1979, Dr. Scott had died.

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1. Department of Sociology Personnel Policy, Defense Exhibit 8.

II. Scott's Individual Claims.

Scott alleged individual claims of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e *et seq.*, and the Civil Rights Acts of 1866, 42 U.S.C. § 1981, and 1871, 42 U.S.C § 1983. With respect to each of these claims Scott proceeded in the district court on a "disparate treatment" theory, contending that he was purposefully treated less favorably by the University than similarly situated white faculty members. Both in the district court and on appeal, the parties have proceeded under the assumption that the substantive scope of liability under each of the Civil Rights Acts is the same with respect to Scott's individual claims of discrimination. Since the case has been presented to us in these terms, we will assume without deciding that this reflects a proper interpretation of these statutes.[2]

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2. The causes of action under each of the Civil Rights Acts are distinct and independent, and have different procedural, jurisdicional, and remedial characteristics. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 455 (1975); F. Schlei & P. Grossman, Employment Discrimination Law 635-39 (1976). Also, differnet groups of persons are protected against discrimination under these various statutes. *See* B. Schlei & P. Grossman, *supra*, at 599-629.

In New York City Transit Authority v. Beazer, 47 U.S.L.W. 4291 (U.S. March 21, 1979), a case which upheld against Title VII and equal protection challenges a regulation of the Transit Authority prohibiting the employment of methadone users, the Supreme Court described the relationship between Title VII and § 1981 as follows:

> ". . . our treatment of the Title VII claim also disposes of the § 1981 claim without need for a remand. Although the exact applicability of that provision has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII." *Id.* at 4295 n.24.

Lower federal courts ahve generally concluded that the substantive scope of liability under § 1981 in an individual employment discrimination action is congruent with that under Title VII. *See* Sabol v. Snyder, 524 F.2d 1009, 1012 (10th Cir. 1975); Long v. Ford Motor Co., 496 F.2d 500, 505 n.11 (6th Cir. 1974) (order and allocation of proof); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1281 n.3 (7th Cir. 1977).

Section 1983 requires that Scott prove that he has been deprived of a right "secured by the constitution and the laws" of the United States, and that the University deprived him of this right while acting "under color of any statute" of Delaware. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155-56 (1978). It is conceded that the University and its officials are state actors for purposes of § 1983 liability. The only federal rights independent of § 1983 which Scott has identified on this appeal are those which he possesses under § 1981 and Title VII.

The parameters of a disparate treatment theory in the context of an individual Title VII action were described by the Supreme Court in *McDonnell Douglass Corporation v. Green*, 411 U.S. 792, 802 (1973) (footnote omitted):

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Once the plaintiff establishes such a prima facie case, "[t]he burden must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If the employer produces evidence which satisfies this burden, the individual plaintiff must then be presented with "a fair opportunity to show that [the employer's] stated reason for [the individual plaintiff's] rejection was in fact pretext." *Id.* at 803. *Accord, Furnco Construction Corporation v. Waters*, 46 U.S.L.W. 4966, 4968-69 (U.S., June 29, 1978).[3]

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court expressed what was only implicit in *McDonnell Douglas*—that proof of discriminatory motive is required in a disparate treatment action. The disparate treatment theory of discrimination was explained as follows:

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it

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3. This theory of Title VII liability has been applied to unlawful discharge cases as well as refusal to hire cases. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. (1976); Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977); Garrett v. Mobil Oil Corp., 531 F.2d 892 (8th Cir.) *cert. denied*, 429 U.S. 8484 (1976); Potter v. Goodwill Industries, 518 F.2d 864 (6th Cir. 1975).

> can in some situations be inferred from the mere fact of differences in treatment. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266. *Id.* at 335 n.15.

The citation to *Arlington Heights* suggests that the motive requirement in disparate treatment cases is similar to that prevailing in equal protection analysis. *See generally* The Supreme Court, 1976 Term, 91 Harv. L. Rev. 70,163 (1977).

In order to establish his disparate treatment claim, Scott presented evidence concerning the University's contract renewal and promotion practices with respect to other members of the faculty. He also presented evidence of individual instances of discrimination against him by members of the University community. Scott contended that this evidence demonstrated the University's discriminatory behavior in that other members of the faculty were granted contract renewals or promotions despite performance in the areas of teaching, scholarship, and community service which was comparable or inferior to his own. After a careful analysis of this evidence and of the facts surrounding the decision not to renew Scott's contract,[4] the district court concluded, essentially on two grounds, that Scott had failed to establish a prima facie case. First, the district court found that the nonrenewal of Scott's contract was not motivated by any racial animus, but "resulted from the opinion of nine members of the Sociology Department that [Scott] was not, and would not develop into, an acceptable permanent professional colleague."[5] Second, the district court found that Scott was not similarly situated to those whom he alleges received preferential treatment, and that Scott's evidence concerning the University's treatment of other faculty members did not indicate racial discrimination.[6]

4. The facts pertaining to Scott's employment at the University are ably set forth in detail in the opinion of the district court, 455 F.Supp. 1102 (D.Del.1978), and will not be repeated here.

5. 455 F.Supp. at 1120-21.

6. *Id.* at 1122-23.

Members of the sociology department testified at trial that although Scott's rating in connection with service to the community was high, he had not developed the high performance levels in the areas of scholarship and teaching that would justify contract renewal. The evidence indicated that Scott had not established a satisfactory record of publication in professional journals and that his teaching effectiveness, despite his previous extensive teaching experience, was criticised by both faculty members and students.

Scott's claim that he was comparable to other faculty members who received preferential treatment was undermined by evidence indicating that those other faculty members lacked his previous teaching experience and that the contract renewal and promotion criteria employed in other departments differed somewhat from those used in the Sociology Department. Moreover, many faculty members with whom Scott compared himself had accepted positions at the University prior to 1967, the year in which the University changed its employment policies to emphasize scholarship as a primary criterion in faculty hiring, renewal, and promotions. The University simply provided these faculty members with an opportunity to prove themselves under the new criteria; when they failed to do so, they were terminated. Scott, in contrast, was fully apprised of the relevant evaluation criteria shortly after he assumed his position at the University. Based on this evidence the district court found that Scott was not similarly situated to other faculty members and that the non-renewal of his contract was motivated not by racial considerations but by a general view "that Scott was not the kind of 'sociologist's sociologist' the department was looking for."[7]

Our review of the record satisfies us that the evidence supports the district court's findings of fact, and that these findings are not clearly erroneous. *See Krasnov v. Dinan,* 465 F.2d 1298, 1302 (3d Cir. 1972) (clearly erroneous standard of review of factfindings in non-jury civil cases). We therefore affirm the entry of judgment

7. *Id.* at 1121.

against Scott on his individual claims under Title VII, § 1981, and § 1983.[8]

III. CLASS CLAIMS.

A. *The District Court's Class Certification Order.*

In addition to his individual claims, Scott sought certification of a class composed "of all blacks who have been or will be discriminated against on the basis of race and color in hiring, firing, recruitment, promotion, supervision, wages, terms, conditions and privileges of employment by defendants."[9] He alleged that the Rule 23(a) prerequisites for class certification were satisfied, including the assertion that the class was so numerous as to render joinder of all members impracticable. On September 29, 1975, the district court, over the University's objection, certified the class requested by Scott.[10] For purposes

8. Insofar as Scott sought injunctive and declaratory relief compelling the University to reinstate him and renew his contract, these claims have been mooted by Scott's death. We address the merits of Scott's individual claims because the claim for back pay and damages survives his death. Although compensatory and punitive damages are generally not recoverable under Title VII, *see* B. Schlei and P. Grossman, Employment Discrimination Law 258-59 (1976), Scott, if he prevailed on his individual claims, might be entitled to back pay until the time of his death. *See* Hodgson v. Ideal Corrugated Box Co., 10 FEP Cases 744, 752-53 (N.D. W.Va. 1974).

Compensatory and, in certain circumstances, punitive damages are available under § 1981 and § 1983. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975); Batista v. Weir, 340 F.2d 74 (3d Cir. 1965). Because neither § 1981 nor § 1983 specifies whether a cause of action under that statute survives the death of the plaintiff, the federal courts seek guidance from state survival acts provided they are not inconsistent with the policies underlying the federal statutes. *See* Brazier v. Cherry, 293 F.2d 401 (5th Cir), *cert. denied*, 368 U.S. 921 (1961); Pritchard v. Smith, 289 F.2d 153 (8th Cir. 1961). The Delaware survival statute, set forth at Del. Code Ann., Chapt. 10, §§ 3701-08, would permit the continuation of an action for damages.

9. Amended Complaint, App. 7a.

10. Order of September 20, 1975, App. 26a-27a. After limited discovery had been conducted, the University moved to decertify the action as a class action on the ground that Scott had failed to identify any black faculty members other than himself who were discriminated against by the University. The district court denied this motion for substantially the same reasons that it had granted the class certification motion initially. *See* 16 FEP Cases 737 (D.Del.1976) (opinion denying decertification motion).

of trial, however, two subclasses were informally recognized by the district court: "a class which includes blacks who allegedly have been or will be discriminated against in recruitment and hiring,"[11] and a class of black University faculty members who have been discriminated against in the terms and conditions of their employment. With respect to both subclasses, the district court concluded that class treatment was appropriate under Rule 23(b)(2) because injunctive or declaratory relief was sought with respect to the class certified as a whole.

Both in the district court and now on appeal, the University has contested the correctness of the district court's class certification. This attack is concentrated on Scott's alleged failure to satisfy the prerequisites for class maintenance set forth in Rule 23(a). Scott, in turn, contends that the class certification issue is not properly before us for review and, alternatively, that the class was properly certified. Accordingly, we first turn to the reviewability of the class certification issue.

B. *Reviewability of Class Certification Order.*

Scott contends that the propriety of the class certification is not properly before us for review because the University has failed to take a cross-appeal.[12] For several reasons, we are

11. 68 F.R.D. 606, 608 (D.Del.1975).

12. The necessity for a cross-appeal was described by Justice Brandeis in United States v. American Railway Express Co., 265 U.S. 425, 435 (1924):

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

See Washington v. Confederated Bands and Tribes, 99 S.Ct. 740, 749 n.20 (1979). Since the University prevailed upon the merits of the class claims in the district court, its attack upon the class certification on appeal will not enlarge it own rights or lessen those of its adversary. Rather, our conclusion that the class

unpersuaded by his argument. The failure to file a cross appeal does not affect our power to consider the class certification issue. *See Rhoads v. Ford Motor Co.*, 514 F.2d 931, 934 (3d Cir. 1975); *Chicago, Burlington & Quincy R.R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263, 1268 n.5 (8th Cir. 1973); *Arnold's Hofbrau, Inc. v. George Hyman Construction Co., Inc.*, 480 F.2d 1145, 1150 (D.C. Cir. 1973); *Tug Raven v. Trexler*, 419 F.2d 536, 548 (4th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3904 (1976); 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice § 204.11[5] (2d ed. 1975). This requirement has been described as a "rule of practice," *Tug Raven v. Trexler*, 419 F.2d at 548, rather than a jurisdictional restriction on federal appellate courts. Although generally we restrict the exercise of our appellate jurisdiction to occasions in which a formal cross-appeal has been filed,[13] in cases such as this, we are not mandated to do so. *See United States v. United States Steel Corporation*, 520 F.2d 1043, 1052 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976)

In this case, the alignment of the parties makes it particularly inappropriate that we deny review of the class certification. Here, it is the absent class members who will be harmed by the effect of the district court's judgment in favor of the University on the merits of the class claims. These absentees, however, cannot be expected to be represented adequately by the University, the party that is perforce assigned to challenge the class certification. Nor can it be assumed that they will be represented adequately or effectively by the named class representative—the party that

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was improperly certified will cause the University to forfeit whatever preclusion effects it may have derived from the district court's judgment on the class claims. This fact, as well as the party structure of the lawsuit, makes it appropriate for us to review the district court's class certification despite the absence of a cross-appeal.

13. *See* County of Los Angeles v. Davis, 99 S.Ct. 1379, 1382 n.3 (1979); Joseph v. Norman's Health Club, Inc., 532 F.2d 86, 88 n.2 (8th Cir. 1976). We think that the discussion in these cases was addressed only to the discretion, and not the power, of the court in declining to consider a class certification issue not raised in a cross-appeal.

sought class certification—when the propriety of the class certification is challenged on grounds suggesting inadequate representation. In this circumstance, "there remains a duty upon the court to consider carefully the requirement of fair and adequate protection in view of the serious consequences of *res judicata* in class actions." *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 311 (6th Cir. 1975) *vacated and remanded on other grounds*, 431 U.S. 951 (1977). The record here reveals apparent deficiencies in the satisfaction of the Rule 23(a) requirements for class certification, deficiencies which militate strongly against certification of the class. If the University's failure to file a cross-appeal were permitted to control our review of the certification issue, we would be abdicating our responsibility to absent class members.[13a]

In this case, therefore, we follow the practice established in *Rhoads v. Ford Motor Company*, 514 F.2d at 934, where Judge Aldisert wrote:

> While better practice would have dictated that Rhoads file a protective cross-appeal, in these circumstances we will not allow his failure to file a notice of appeal to preclude our review of the record. In this respect, we follow the rule we recently invoked in a modified context: once appellate jurisdiction attaches, "'the power of the court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there.'" McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032 (3 Cir. 1974), quoting 9 J. Moore, Federal Practice paragraph 110.25[1], at 273 (2d ed. 1973).

With these considerations in mind, we next turn to the propriety of the district court's actions in certifying the class action and in then refusing to decertify it in light of the facts developed at trial.

13a. While there may be cases, such as this one, in which it "just under the circumstances", 28 U.S.C. § 2106, to abjure the requirement of a cross-appeal, we are not convinced that Judge Adams' analysis in his concurring opinion is a salutary one for all cases. His analysis would in all cases, dilute the benefits of a cross-appeal requirement — adequate notice and a sharp framing of the issues on appeal — even though it is the appellee who controls the strategic decision of whether to challenge the class certification on appeal, as it did here.

C. *Merits of the Class Certification Order.*

The University contends that Scott failed to satisfy the numerosity, commonality, and typicality prerequisites to class certification set forth in Rule 23(a).[14] No point is made on appeal concerning the district court's conclusion that the requirements of Rule 23(b)(2) were satisfied in this case. Accordingly, we will focus our attention on the prerequisites for class treatment set forth in Rule 23(a).[15] This subdivision states that class certification is proper only if "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Proc. 23(a).[16]

The subdivision (a) prerequisites to class certification perform two principal functions. By requiring the existence of common questions of law or fact and the impracticability of joinder, a threshold standard as to the appropriateness of class treatment is

14. The scope of review of a district court's determination as to whether the prerequisites for class treatment set forth in Rule 23(a) have been satisfied was described in Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.) (*en banc*), *cert. denied,* 419 U.S. 885 (1974), as follows:

> The district court must determine if the four prerequisites for a class action listed in rule 23(a) have been met. These are mandatory requirements, and our review decides whether the mandates have been met.

Accord, Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 245 (3d Cir.) *cert. denied,* 421 U.S. 1011 (1975). If the district court has properly applied the mandatory criteria of Rule 23, we must then determine whether the approval or denial of class certification constituted an abuse of discrtion. *See* Bogus v. American Speech & Hearing Ass'n, 582 F.2d 277, 289-90 (3d Cir. 1978); Paton v. La Prade, 524 F.2d 862, 875 (3d Cir. 1975).

15. This is not to say that the subdivision (b) ruling is entirely irrelevant to a court's assessment as to whether the subdivision (a) prerequisites ahve been satisfied. In a subdivision (b)(2) action in which the primary justification for class certification is simply judicial economy, a court must be concerned with the interests of absent class members because they have not received individual notice.

16. A class action may be maintained if, in addition to the prerequisites of Rule 23(a), one of the categories of Rule 23(b) is also satisfied.

established. The requirements of commonality, typicality, and adequacy of protection afforded the interests of unnamed class members, in turn, all assure that the interests of absent class members will be adequately represented by the named class representatives.[17] Adequate representation, in addition to being required by Rule 23, is constitutionally mandated if absent class members are to be bound by the judgment concerning the class claims. *Hansberry v. Lee,* 311 U.S. 32 (1940). According to the University, the facts developed at trial disclosed that the Rule 23(a) prerequisites would not be satisfied by certification of either a class (or subclass) consisting of applicants seeking faculty positions or a class consisting of those who have obtained faculty status.[18]

1. *Applicant Class.*

Two basic objections are raised to Scott representing a subclass consisting of applicants seeking faculty positions who challenge the University's alleged discriminatory hiring practices. First, since Scott was a faculty member of the University at the time this lawsuit was commenced and since he personally does not complain of discrimination in his hiring, his claim against the University is not typical of those applicants who have sought or

17. In Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 243 (3d cir.), *cert. denied,* 421 U.S. 1011 (1975), this court described the adequacy of representation doctrine as follows:

> Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.

No suggestion has been made that Scott's counsel was not fully competent to handle this litigation. The case was well argued and briefed on appeal, and we do not rest our holding in any way on the quality of Scott's legal representation.

18. Although the University contends that the district court erred in its initial certification of hte class action, we need not resolve that issue on this appeal. Even if we were to assume that the initial certification was proper, we think that the facts that emerged in the course of trial demonstrated that the adequate representation and numerosity prerequisites were not satisfied, and that accordingly the class should have been decertified when that situation became apparent. *See* Weisman v. MCA Inc., 45 F.R.D. 258, 260 n.1 (D.Del.1968) (court has obligation to proceed under Rule 23(c) even in the absence of a proper motion).

who may hereafter seek faculty positions. Second, Scott did not allege, and the evidence adduced at trial did not disclose, that any identified individuals were discriminated against by the University's hiring practices. The University contends that the applicant class which Scott sought to represent is nothing more than hypothetical and that the numerosity requirement is therefore unsatisfied.

When the interests of the named class representative and unnamed class members coincide, there is no question but that insofar as the claims are concerned the typicality requirement of subdivision (a) is satisfied. *See, e.g., In re Sugar Industry Antitrust Litigation,* 73 F.R.D. 322, 336 (E.D. Pa. 1976); *Hernandez v. United Fire Insurance Co.,* 79 F.R.D. 419, 425 (N.D. Ill. 1978). That however, is not this case. Nor is our case one in which the interests of the named representative merely diverge from, but do not clearly conflict with, those of unnamed class members. Often such a divergence will be harmless in that it will not impair the incentive of the named representative in vigorously prosecuting all aspects of the case. *See Sullivan v. Chase Investment Services of Boston, Inc.,* 79 F.R.D. 246, 257-58 (N.D. Cal 1978); *Dolgow v. Anderson,* 43 F.R.D. 472, 494 (E.D. N.Y. 1968), *rev'd on other grounds,* 438 F.2d 825 (2d Cir. 1970).[19]

19. Recently, in East Texas Motor Freight, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977), the Supreme Court stated that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as class members." Standing alone, this language might suggest that class certification is always inappropriate when there are divergent interests between the named representative and absent class members. However, when read in context, it is evident that the Court did not intend to speak quite so broadly. The cases cited in support of the court's statement did not concern the interpretation of Rule 23, but rather concerned the standing of the named representative to bring the suit. If the named representative has suffered no injury in fact relative to the class claims, the named representative may lack standing because of the Article III case or controversy requirement. *But cf.* Rizzo v. Goode, 423 U.S. 362 (1976) (standing requirement satisfied by injury to entire class). Moreover, the Court in *East Texas Motor Freight* went on to suggest that there was an actual conflict of interests between the plaintiffs and the class they were certified as having represented. *See* 431 U.S. at 405. Finally, the procedural posture of *East Texas Motor Freight* was *sui generis* since the court of appeals had certified the class after the district court had made findings indicating that the plaintiffs were not proper class representatives.

Moreover, when notice to absentees is required, class members with divergent claims or stategies will be able to inform the court of their views. If necessary, the court may designate a number of class representatives, each advancing somewhat different theories of the case, and may establish subclasses to accommodate divergent views as the litigation proceeds. *See* Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1475-89 (1976). No mere divergence of interests is presented, however, by Scott's complaint. Rather, the case before us presents a clear conflict of interests between Scott, the named representative, and the unnamed members of the applicant subclass. These antagonistic interests leave no doubt that failure to decertify the class action was improper. *See Wetzel v. Liberty Mutual Insurance Cjo.,* 508 F.2d 239, 243 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975).

The record discloses that Scott was the sole named representative in this case, and that his interests as a faculty member whose contract was subject to renewal were necessarily in conflict with those of applicants for positions on the University faculty. Scott had received an appointment to the University faculty, and held a doctor of philosophy degree when he assumed his position. Moreover, he received a premium over the salary normally paid by the University. Understandably, in view of these facts, he could not, and does not, claim that he was discriminated against by the University's hiring policies. Despite these facts, Scott seeks to lead a challenge against the same University hiring policies which resulted in his employment. Moreover, in so doing, he disputes the validity of the University's requirement of a doctoral degree as a primary hiring criterion. He

19 Continued

Based on these factors, we agree that "[t]he conflict between the permissive and the rigorous approaches to the Rule 23(a) prerequisites was not settled by the Supreme Court's treatment of 23(a) in *Rodriguez.*" Note, Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2), 88 Yale L.J. 868, 882 (1979). *See generally* Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664 (1979).

thus attacks, via the applicant class, the very degree which he possesses and which he asserts in his own favor in seeking relief on his individual disparate treatment claim. The assertion of these inconsistent positions necessarily forecloses any contention that Scott's claims are typical of the claims of those applying for faculty positions. Under these circumstances, it cannot be said that Scott was an adequate representative of the unnamed members of a class seeking employment.[20] This being so, the prerequisites for certification of such a class were not satisfied.[21]

East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977), provides strong support fo the result which we reach here. The Supreme Court there held that the court of appeals erred in certifying *on appeal* a discrimination action for class treatment since "it was evident by the time the case reached that court that the named plaintiffs were not proper class

20. *See* Bolden v. Pennsylvania State Police, 578 F.2d 912, 924 (3d Cir. 1978) (Garth, J., concurring in part and dissenting in part) (Rule 24(a) intervention should be permited for nonminority applicant class because their interests were inadequately protected by the Fraternal Order of Police, representing current police officers, in seeking modification of Consent Decree. ". . . FOP and the present police officer have a much stronger and more direct interest in the *promotion* feature of the Consent Decree, rather than the *hiring* features with which the applicants are primarily concerned.").

21. We recognize that in Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975), the court permitted former employees of Liberty Mutual to represent a class challenging Liberty Mutual's hiring and promotion policies. Although we agree with the legal standard of adequate representation announced in *Wetzel, see* note 17 *supra,* we find that case factually inapposite to Scott's appeal. In that case, Liberty Mutual objected to the class certification on the ground that the *former employees,* "who have voluntarily severed their employment prior to suit cannot adequately represent members of the class who are *presently employed* by the company." 508 F.2d at 247. (emphasis supplied). Liberty Mutual never raised, and the court apparently never considered, the issue of whether *current employees* can represent a class of *prospective employees.* Certainly the interests of the former employees in *Wetzel,* who had voluntarily left their employment, would not be adversely affected by potential competition from prospective employees. Scott, in contrast, would have been in sharp competition for contract renewal and tenure with applicants who might be offered faculty positions. The flavor of this competition is suggested by Scott's having successfully negotiaged for a salary higher than that usually paid by the University, and by his having argued against a Ph.D. requirement on behalf of the applicant class but having emphasized his won Ph.D. in support of his individual claims.

representatives under Fed. Rule Civ. Proc. 23(a)." *Id.* at 403.[22] They were not proper class representatives because the district court found that the plaintiffs lacked the qualifications to be hired for the positions which they sought. "Thus, they could have suffered no injury as a result of the alleged discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury." *Id.* at 403-04. Moreover, the Court noted that the named plaintiffs had failed to move for class certification in the district court, and that they were demanding certain forms of relief in conflict with the views expressed by members of the class they sought to

22. In *East Texas Motor Freight,* the Supreme Court recognized that the point in a trial at which a class certification issue is adjudicated will have some influence on an appellate court's review of the decision on that issue. The Court expressed this understanding as follows:

> Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. See, e.g. Franks v. Bowman Transportation Co., 424 U.S. 747 752-757; Moss v. Lane Co., 471 F.2d 853, 855-856 (CA4). Where no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the fcts developed at the trial of the plaintiffs' individual claims. At that point, as the Court of Appeals recognized in this case, "ther [are] involved none of the imponderables that make the [class action] decision so difficult early in litigation." 505 F.2d, at 51. See also Cox v. Babcock & Wilcox Co., 472 F.2d 13, 15-16 (CA4).

431 U.S. at 406 n.12.

This analysis suggests that if a district court's initial certification order was proper in view of the limited facts before the court at the time of its ruling, the subsequent development of facts at trial undermining this order may merely result in harmless error if there is nonetheless a full and fail presentation at trial of the claims of the class. Conversely, if it appears that there was not a full and fair presentation of the class claims at trial, as might be suggested if those claims were denied, then any error in the initial certification would not be harmless. Thus, even if we were to assume that the initial certification order was proper, *see* note 18, *supra,* we would conclude that the district court erred in refusing to decertify this case as a class action. This error was not harmless in view of the conflict between Scott's individual claims and those of the applicant class.

represent. *See id.* at 404-05.

Similarly, in this case, Scott concedes that he personally suffered no discrimination when he was hired. Since he was not injured by any alleged discriminatory hiring practices, it is doubtful after *East Texas Motor Freight* that he can lead a class challenging the University's hiring practices.[23] Furthermore, Scott's attack on the University's hiring practices was in crucial respects in conflict with his individual claims. The existence of this conflict makes this case an even stronger one than *East Texas Motor Freight* for denying class treatment, and impels us to hold that the district court erred in refusing to decertify the applicant class with Scott as its named representative once this conflict became apparent.[24]

2. *Faculty Class.*

In addition to the subclass of applicants for faculty positions at the University, the district court's class certification order included a subclass of all faculty members who have been or in the future will be discriminated against on racial grounds with respect to the University's contract renewal, promotion, and tenure policies. The University contends, however, that decertification was required with respect to this subclass because the Rule 23(a) numerosity requirement was not satisfied.

23. Several courts have held that a named plaintiff who challenges a defendant's dicriminatory *promotion* practices may not represent a class contesting the defendant's *hiring* practices because these claims are insufficiently similar. *See* Hill v. Western Electric Co., Inc., No. 76-2439 (4th Cir. 1979); Chavez v. Tempe Union High School Dist. #213, 565 F.2d 1087, 1094 n.10 (9th Cir. 1977); United States v. School Bd. of City of Suffolk, 418 F.Supp. 639 (E.D. Va. 1976), *aff'd in part and rev'd in part on other grounds sub nom.*, Walston v. School Bd. of City of Suffolk, 566 F.2d 1201 (4th Cir. 1977); Greene v. Brown, 451 F.Supp. 1266 (E.D. Va 1978). *See also* Walker v. World Tire Corp., Inc., 563 F.2d 918 (8th Cir. 1977); Satterwhite v. City of Greenville, 578 F.2d 987, 991-92 (5th Cir. 1978) (en banc) *petition for cert. filed*, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (No. 78-1008); Tuft v. McDonnell Douglas Corp., 581 F.2d 1304 (8th Cir. 1978) *But cf.* Dickerson v. United States Steel Corp., 439 F.Supp. 55, 61-62 (E.D. Pa. 1977) (*Rodriguez* does not preclude "across-the-board" class certification in antidiscrimination action).

24. Because we rest our holding on the ground that Scott could not be an adequate representative of the applicant subclass, we do not reach the issue of whether the numerosity requirement was satisfied with respect to that subclass.

The numerosity requirement was designed "'to prevent members of a small class from being unnecessarily deprived of their rights without a day in court' by the opposing party or by only a few members of the class resorting to Rule 23." 7 C. Wright & A. Miller, Federal Practice and Procedure § 1762 at 593 (1972). It also fosters the interest of the court in assuring a full and fair exposition of views by all affected parties when it is practicable to join them in a single proceeding. These beneficial objectives are undermined, however, by the facile conclusion that the numerosity requirement may always be satisfied in anti-discrimination class actions because there exist unidentified future class members who may suffer discrimination.[25] We cannot ignore the possibility that "the framing of overbroad classes may result in the loss of claims of absent members which, had the class been appropriately framed, might well have been successfully asserted." *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 43 (N.D. Cal. 1977).

The findings of fact made by the district court in this case reveal that only a small number of black faculty members had been subjected to the University's employment practices. With respect to promotions and tenure, the district court made the following findings:

> Of the twelve black full time faculty at the time of trial, two were tenured and two were on the verge of being tenured. Of the remaining eight black faculty members, only

25. *See* Fairfield Gloves v. United States, 73 F.R.D. 131, 133 (E.D. N.Y. 1977); Piva v. Xerox Corp., 70 F.R.D. 378, 388 (N.D. Cal 1975). *Cf.* Committee to Free the Fort Dix 38 v. Collins, 429 F.2d 807, 812 (3d Cir. 1970) (class certification improper when "[n]owhere in the complaint are any persons other than the appellants themselves specified as being within the class affected").

In Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3d Cir.) *cert. denied*, 421 U.S. 1011 (1975), this court held that future class members could properly be included in the class certification under subdivision (b)(2). *Id.* at 254. Future class members were not expressly considered by the court, however, in its discussion of whether the numerosity requirement of subdivision (a)(1) was satisfied. Instead, the court focused on the number of persons who would *presently* fall within the class. *Id.* at 246-47. At least by negative implication, this part of the court's opinion can be read in support of the position that future class members are not to be counted or relied upon for purposes of complying with the numerosity requirement of subdivision (a)(1).

> four had been on the faculty for three years. Of these four, Gregory and Miles ahd only Bachelor's degrees, and Farrow and Washington had only Master's degrees. Thus, every black faculty member with a doctorate and with three or more years of service at the University was tenured or near tenure. The only other black faculty members who have stayed at the Univesity for more than three years in the past were Hilda Davis, a Ph.D. in Sociology, who had a special function in the Writing Center of the English Department, and Mary Farrell, who had only a Master's degree, and who was recommended for promotion (though not tenure) when she left the University in 1974. In addition, the University has attempted to hire Doctors Eubanks and Colson into tenured positions on its faculty.
>
> The record on promotions is too sketchy to draw any inference. All we know is that there were some promotions of black faculty and that the EEOC found that two of the three blacks who became eligible for promotion between 1972 and 1975 were promoted.

455 F.Supp. at 1131-32 (footnotes omitted).

The evidence pertaining to contract renewals suggests an even smaller number of black persons affected:

> Finally, with respect to renewals; there is no evidence of any black faculty member other than Dr. Scott who had not had his contract renewed. Indeed, no faculty member other than Dr. Scott is identified in the record as one claiming to be a victim of any racial discrimination in renewal, promotion or tenure at the University.

Id. at 1132.

Id. at 1132.

In view of the district court's findings, we must conclude, on the facts of this case, that the numerosity requirement for class certification was not satisfied with respect to the faculty subclass. Scott has not identified a single past or present faculty member, other than himself, who was arguably discriminated against by the University's contract renewal, promotion, and tenure practices. Moreover, the number of black faculty members at the University who may have been subject to such discrimination is not so large as to make joinder impracticable. *See Kelly v.*

Norfolk and Western Railway Co., 584 F.2d 34 (4th Cir. 1978). Furthermore, no suggestion has been made that any past or current members of the faculty who may feel that they have been discriminated against are in any way disabled from maintaining an antidiscrimination action on their own behalf.

Against this backgound concerning past and current faculty members, we do not think the mere allegation that *future* faculty members may be discriminated against is sufficient to satisfy the numerosity requirement. The class of future faculty members is simply ephemeral on the facts of this case—it is constructed on the hypotheses that the University will hire blacks for faculty positions and then discriminate against them by refusing to renew employment contracts or by denying promotion or tenure solely on the basis of race. Scott has introduced no evidence which would support this hypothesis. In such a circumstance, we do not think that future faculty members, whose possible claims are only speculative and can only be formulated in a highly abstract and conclusory fashion, should provide, and possibly be prejudiced by, membership in the class which Scott seeks to represent. For these reasons, we hold that the numerosity requirement of Rule 23(a) was not satisfied with respect to the faculty subclass, and that this subclass should have been decertified when this circumstance became apparent.

IV. Conclusion.

The final judgment of the district court dated August 16, 1978 provided that "judgment is entered for the defendants and against the plaintiff."

We will affirm so much of that final judgment entered in favor of the defendants as pertains to Scott's individual disparate treatment claims.

Because we have concluded that the district court erred in refusing to decertify Scott's class action, we will vacate so much of the final judgment as pertains to the class action. In accordance therewith, we will remand to the district court with instructions that an order be entered decertifying the class actin

and dismissing without prejudice all of the class action claims asserted by Scott, thereby disposing of all claims presented in this action.

ADAMS, *Circuit Judge*, concurring.

Although I concur in the judgment of the Court, I write separately for two reasons. First, I believe my views on the necessity of filing a cross-appeal differ from those set forth in the majority opinion. Second, I consider it important to underscore what I understand to be the limited scope of our holding regarding class certification.

I. NECESSITY OF FILING A CROSS-APPEAL

The appelllate process is triggered by the relatively simple, yet mandatory mechanism of the filing of a notice of appeal which designates the judgment, order, or part thereof, that the appellant seeks to have overturned. The appellee, of course, need not subsequently cross-appeal in order to defend the judgment in his favor. In fact, as Justice Cardozo noted, it is an "inveterate and certain" rule that an appellee may, without filing a cross-appeal, "'urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.'"[1] Apart from a number of practical considerations,[2] this rule reflects "the notion that a person who is satisfied with the action of a court should not have to appeal from it, no matter what his adversary does."[3] Furthermore, as

1. Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191 (1937), *quoting* United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924). *See also* Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970).

2. For instance, because the substantive questions which the sppellant plans to raise generally are not included in the notice of appeal, the appellee will often be unable to determine whether a cross-appeal is necessary to preserve an argument that he intends to make on his own behalf. *See generally*, Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763, 765-67 (1974).

3. *Id.* at 765.

commentators have observed, a contrary practice could ofttime present "the paradoxical situation of requiring a cross-appeal under circumstances which would seem not to permit a direct appeal."[4]

The rationale underlying the general rule also provides a basis for assessing when a cross-appeal is necessary. Thus, for example, and of relevance here, "what [an appellee] may not do in the absence of a cross-appeal is to "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.'"[5]

In the present case, brought by "Nolvert P. Scott, Jr., individually and on behalf of all other persons similarly situated," final judgment was "entered for the defendants and against the plaintiff."[6] Although the University had opposed certification of the class, it was required to litigate both the individual and the class claims in an extended trial, at which it ultimately prevailed. Needless to say, the University was pleased with this result, and had no occasion at the time the district court judgment was entered to seek appellate review of the prior interlocutory order that had certified the class, particularly since such review might jeopardize the *res judicata* effect of its hardfought victory. When Scott filed an appeal, however, the University, as one of several possible grounds for preserving the judgment in its favor, tendered the argument that the class had been improperly certified. Desiring to protect the class certification from appellate scrutiny while he pressed his challenge to the district court's disposition of the class claims, Scott contended that review of the propriety of the certification

4. *Id.*, *quoting* Note, *Cross-appeals in Maine: Pitfalls for the Winning Litigant*, 25 Maine L. Rev. 105, 113-14 (1973).

5. *Morley Construction Co., supra*, 300 U.S. at 191, *quoting American Ry. Express Co., supra*, 265 U.S. at 435.

6. Final Judgment, August 16, 1978. App. at 161a.

of the class was precluded because the University had neglected to file a cross-appeal challenging the class certification.

The majority concludes that the class certification may be reviewed on appeal. But although it recognizes that in challenging the class certification the University does not seek to enlarge its own rights or lessen those of its adversary,[7] its opinion appears not to regard his challenge as qualifying under the general rule that an appellee need not cross-appeal in order to advance an argument that had been rejected or ignored by the trial court but that supports the judgment in its favor. Instead, and quite importantly, the opinion assumes that ordinarily a court will decline to consider a class-certification issue not raised by cross-appeal, and proceeds to assert that this "rule of practice" ought to be overlooked in the present case because otherwise the Court "would be abdicating [its] responsibility to absent class members."[8]

The suggestion by the majority that the result here comes about as a departure from the general rule is somewhat troublesome, at least to me. It is true, as a technical matter, that in raising the class certification issue the appellee may be seen as requesting not an affirmance on the merits but rather that the judgment of the tiral court be vacated and the cause remanded with directions that the class action claim be dismissed. But that should be of no consequence to the rule governing cross-appeals.[9] For, as already indicated above, it is evident that a prevailing

7. *Supra*, at 10-11 n.12.

8. *Id.* at 12.

9. *Contra*, Joseph v. Norman's Health Club, Inc., 532 F.2d 86, 88 n.2 (8 Cir. 1976) (no analysis provided). The Supreme Court recently appears to have been applying a more restrictive rule, under which it has refused to address areguments that would necessitate changing more of the judgment than is brought into issue by the initial appeal. *See* Strunk v. United States, 412 U.S. 434, 437 (1973); NLRB v. International Van Lines, 409 U.S. 48, 52 & n.4 (1972). *See also* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 n.4 (1970). Under such an approach, a cross-appeal would be required for review of a class certification ruling. These recent cases, however, may be explained by the different considerations that bear upon the Supreme Court's review process and that limit it to questions of national importance on which certiorari has been granted. *See* Stern, *supra* note 2, at 777-79.

party, such as the Unviersity here, is satisfied with the judgment and does not seek to have it modified to increase its rights or to lesson those of its adversary. In fact, it would prefer not to have the judgment disturbed at all, and merely raises the class certification issue to protect itself in the event that the favorable ruling it secured on the merits is overturned.[10] Inasmuch as the purpose for filing a notice of appeal or notice of a cross-appeal is to invoke appellate jurisdiction to review a judgment and to have the adversary notified that the judgment is being challenged,[11] I see no reason to require the appellee to file a cross-appeal in order to preserve a backup ground for protecting a judgment that has been rendered in its favor, when an appeal has already been filed from that judgment.

Moreover, it seems to be unfair to require that a cross-appeal be filed in order to secure review of the class certification decision, notwithstanding the fact that an appeal has been taken from the final judgment. This requirement would create a trap for the unsophisticated and unwary attorney, who was assured that the class certification order would be reviewed if and when an appeal is filed from the final judgment, rather than immediately, as he undoubtedly would have preferred.[12] Such an appellee is

10. *Compare* County of Los Angeles v. Davis, 99 S.Ct. 1379, 1382 n.3 (1979) (respondents contend that their failure to include past applicants in the class was a "mere oversight;" however, the Supreme Court will not *modify* judgment to correct this fatal error since no cross-petition was filed).

11. Contrary to the majority, I do not believe that a purpose of the cross-appeal requirement is "a sharp framing of the issues on appeal," *supra*, at 12 n.13a. The practice governing cross-appeals is controlled by the rules pertaining to appeals, and under Fed. R. App. P. 3(c), a notice of appeal need designate only "the judgment, order or part thereof appealed from." A sample of such a notice is provided in Form 1 of the Appendix to the Rules, and leaves no doubt that the appellant or cross-appellant need not identify the points he intends to argue. That function, as well as a sharp framing of the issues, is properly accomplished by the various briefs. *See generally* Stern, *supra* note 2, at 756-66. The briefs on this appeal make it abundantly clear that the University squarely took issue with the class certification ruling, and that the plaintiffs had ample opportunity to respond in their reply brief.

12. It should be recalled that not too long ago virtually all routine avenues for obtaining immediate appellate review of an order certifying a class were foreclosed, thereby deferring review of class action rulings until after a final

likely to neglect to file a cross-appeal because he is satisfied with the ultimate outcome of the trial.

Finally, the course apparently charted by the majority would seem to be unwise, for it introduces a new element of uncertainty into a relatively settled area of the law.[13] It would force an appellee to file a cross-appeal whenever any doubt exists as to whether a court of appeals will consider arguments supporting the judgment in his favor, and, more significantly, would punish him for failing to do so. In addition, this approach may be critized for widening the power of the judiciary to engage in unprincipled decisionmaking. This is so because it would expand the reach of a "rule of practice" requiring cross-appeals and then would selectively waive its application when any particular panel deems it to be in the interest of justice.

II. Class Certification

Turning to the class certification issue presented in this case, I am in basic agreement with the majority opinion on this subject, but consider it important to add two caveats.

First, it should be emphasized that we do not hold that the trial court committed reversible error when it certified the class at the outset of the litigation. Rule 23(c) directs the trial judge to determine "[a]s soon as practicable after the commencement of an action" whether it is to be maintained as a class action, but also permits the judge to modify his order before the decision on

12 Continued

judgment is entered. *See* Copper & Lybrand v. Livesay, 437 U.S. 463 (1978); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978). Implicit in that development, at least to me, is the understanding that the entire record, including all interlocutory rulings (be they related to discovery, the introduction of evidence, or the certification of the class), will be open to secrutiny if and when an appeal is taken at the end of the case.

13. While the majority's reference to Rhoads v. Ford Motor Co., 514 F.2d 931 (3 Cir. 1975), might be construed as suggesting that this Court has struck a different course from the traditional rule controlling cross-appeals, I do not regard the parenthetical remark in that case that "better practice would have dictated that Rhoads file a protective cross-appeal," *id.* at 934, as intending such a departure, particularly since the Court was not focusing on that issue.

the merits. In keeping with that provision, the trial court ruled at a relatively early stage of the lawsuit that the allegations set forth in Scott's complaint may warrant class action treatment. The judge was cognizant of the possibility that Scott might ultimately fail to satisfy the numerosity or adequate representation requirements. However, he ascertained that the appropriate course was to certify the class, subject to reexamination if subsequently devleoped facts cast doubt on the propriety of that ruling.[14] This initial decision was, in my view, neither erroneous as a matter of law nor an abuse of discretion.[15] Rather, as the majority makes clear, the facts that emerged in the course of the trial demonstrated that the numerosity and adequate representation prerequisites were not satisfied, and accordingly, the class should have been deceritified when that situation became apparent.

Second, as I understand the majority opinion, it is not intended to represent a constriction upon the availability of the class action device in suits charging "across the board" discriminatory employment practices. True, the Supreme Court admonished in *East Texas Motor Freight, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1979), that even though "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs[,] . . . careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." But, like any indefinite standards, the Rule 23(a) prerequisites are themselves capable of being applied more strictly as well as less strictly. And, out of an emerging awareness that the class action device is expected to facilitate the realization

14. Scott v. University of Delaware, 68 F.R.D. 606 (D.Del.1975).

15. The practice has been for courts to construe the requirements of Rule 23 liberally, particularly when the determination of hte propriety of the class action is being made at an early stage of the proceedings, and to modify the order as necessary to comport with subsequently developed facts. Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213 (D. Colo. 1970). *See* Green v. Wolf Corp. 406 F.2d 291, 298 & n.10 (2d Cir. 1968); Cusick v. N. V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F.Supp. 1022, 1026 (E.D. Pa. 1970); 7A C. Wright & A. Miller, Federal Practice and Procedure § 1785 at 138 (1972).

of substantive objectives, courts have been molding class action practice so as to best effectuate the policies underlying the various causes of action.[16] Perhaps nowhere has this interrelationship between procedure and substance been more visible than in the context of class action suits challenging racial discrimination in employment,[17] a development that was foreseen by the drafters of the 1966 amendments to the Rule,[18] and is reflected in opinions of this Court.[19] As the majority observes in footnote 19 of its opinion, we fail to detect a disapprobation of this approach in *East Texas Motor Freight*. Nor, for that matter, do I regard the present decision as heralding a retrenchment by this Court in class action practice.

The determination that, under the circumstances here, Scott may not represent a class consisting of persons harmed by the University's allegedly discriminatory hiring practices, it not, as I see it, grounded on a restrictive notion of class representation. We do not hold that the class representative must stand in an identical position vis-a-vis his employer as the other class members, or that in general a person allegedly discriminated against with respect to promotion may not represent a class including individuals who were aggrieved by the employer's hiring practices. Indeed, in *Wetzel v. Liberty Mutual Insurance*

16. *See generally*, Developments — Class Actions, 89 harv. L. Rev. 1318, 1359-66 (1976).

17. *See generally* 7 C. Wright & A. Miller, Federal Practice and Procedure § 1771 (1972); Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 Yale L.J. 868 (1979).

18. *See* Advisory Committee Note to the 1966 Amendment to Rule 23, *reprinted in* 39 F.R.D. 98, 102. The utility of the class action device as a behicle for the bringing of suits alleging racial discrimination in employment was also anticipated by Congress. In spearheading Congress's rejection of the House version of Title VII, which would have prohibited formal Title VII class action suits, the Senate Committee stated that it agreed "with the courts that Title VII actions are by their very nature class complains [sic], and that any restriction on such actions would greatly undermine the effectiveness of Title VII." S. Rep. No. 415, 92d Cong., 1st Sess. 27 (1971).

19. *See, e.g.*, Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 250-51, 254-55 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1976).

Co., 508 F.2d 239 (3d Cir. 1975), *cert. denied*, 421 U.S. 1011 (1976), this Court held that a former employee, who was not entitled reinstement, may nonetheless attack allegedly discriminatory employment practices on behalf of a class of past and present employees. And in that case we permitted both hiring and promition practices to be challenged by the same representatives. Here, however, we are motivated by a conviction that those persons who may have been discriminated against by the University's hiring practices, which make the possession of a Ph.D. degree or its equivalent a precondition to faculty employment, cannot be adequately represented by a person who was hired because he already possessed that degree and who, quite probably, is interested in preserving the benefits to which that degree entitle him. To quote the majority opinion, "[n]o mere divergence of interests is presented," but "a clear conflict of interests between Scott, the named representative, and the unnamed members of the applicant class."[20]

Similarly, the conclusion that Scott may not represent a class consisting of faculty members who allegedly were discriminated against by the University's contract renewal, promotion and tenure practices is not, as I read it, meant to introduce a rigid rule regarding the numerosity prerequisite of Rule 23(a). The relevant question unde Rule 23(a)(1) is whether "the class is so numerous that joinder of all members in impracticable," an inquiry that obviously is not susceptible to absolute quantification. Moreover, as has been noted above, "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs,"[21] and it may generally be presumed that institutionalized discriminatory employment practices have prejudiced others besides the named plaintiff. But even though an individual plaintiff who establishes a classwide wrong may be entitle to injunctive relief dismantling the discriminatory practice

20. *Supra*, at 16.

21. *East Texas Motor Freight, supra*, 431 U.S. at 403. *See also Wetzel, supra*, 508 F.2d at 250.

and thereby benefiting similarly situated individuals as well, that in itself does not mean that the numerosity requirement of Rule 23(a) has been satisfied. This is so because a court must consider whether the alternative to a class action—joinder of the other allegedly aggrieved parties—is not impracticalbe, before it risks binding those parties without giving them the opportunity to litigate their individual claims. Here, Scott failed to demonstrate that joinder of the other present and past black faculty members, less than a score in number at the very most, is not the more sensible approach to organizing the lawsuit. In fact, Scott made no showing that any present or former faculty member other than himself has been discriminated against. As the majority notes, under these circumstances it would be improper to bootstrap an individual complaint into a class action by hypothesizing a class of aggrieved individuals on the basis of speculative future members, in view of the fact that the interests of individual class members may be prejudiced by such action.

"Across the board" class challenges to discriminatory practices have been recognized as enhancing the enforcement of Title VII and other anti-discrimination statutes, but their use must be carefully supervised by the courts.[22] The measured and prescient observations of Judge Godbold of the Fifth Circuit, who specially concurred in the seminal "across the board" class action decision, best capsulize the considerations that have come to the fore in this case:

> Over-technical limitation of classes by the district courts will drain the life out of Title VII, as will unduly narrow scope of relief once discriminatory acts are found. But without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend.

22. Judicial solicitude for absent class members, through ensuring that all the requirements for bringing a class action are fulfilled, is especially important in the context of a Rule 23(b)(2) type action such as the present one. Inasmuch as absent class members need not be notified regarding the pendency of the suit, *see Wetzel, supra,* 508 F.2d at 254-57, they may be unaware that their claims are being decided and consequently may be unable to protect their own interests.

> And, what may be most significant, an over-broad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammouth corporations. One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the empoyees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?[23]

A True Copy:
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Clerk of the United States Court
of Appeals for the Third Circuit

23. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5 Cir. 1969).

APPENDIX E.

IN THE UNITED STATES DISTICT COURT
FOR THE DISTRICT OF DELAWARE

NOLVERT P. SCOTT, JR.,

Plaintiff,

v.

THE UNIVERSITY OF DELAWARE,
et al.,

Defendants.

Civil Action No. 74-58

ORDER

THIS 25th Day of September, 1975, defendants having moved for reargument pursuant to Local Rule 16 and the Court having duly considered the grounds therefor as set forth in the motion,

Now, therefor, IT IS ORDERED that defendants' motion for reargument is denied.

/s/ Walter K. Stapleton
United States District Judge

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTIRCT OF DELAWARE

NOLVERT P. SCOTT, JR., individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

THE UNIVERSITY OF DELAWARE,
et al.,

Defendants.

Civil Action No. 74-58

ORDER

AND NOW, TO WIT, the Court having considered the briefs and heard oral argument on Plaintiff's Motion for certification of this action as a class action and Defendants Motion to strike from the action its class aspects, and the Court having issued its Memorandum Opinion of September 11, 1975 finding that this action should be maintained as a class action pursuant to Rule 23(a) and 23(b)(2), it is this 29th day of September, 1975, hereby

ORDERED that —

1. Plaintiff's Motion for Determination of a Class Action is granted.

2. This action be maintained as a class action on behalf of all blacks who have been or will be discriminated against by defendants on the basis of race and color in hiring, firing, recruitment, promotion, supervision, wages, terms, conditions and privileges of faculty employment.

3. Defendants Motion to Strike Class Aspects of the Action is denied.

Walter K. Stapleton, Judge

APPROVED AS TO FORM:

BADER, DORSEY & KRESHTOOL
By: Sheldon N. Sandler

Thomas Stephen Neuberger
1102 West Street
Wilmington, Delaware 19899
Attorneys for Plaintiff

POTTER, ANDERSON & CORROON

By: William Poole

John P. Sinclair

James F. Burnett
350 Delaware Trust Building
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Attorneys for Defendants

APPENDIX G.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NOLVERT P. SCOTT, JR., individually
and on behalf of all others similarly
situated,

Plaintiff,

v.

THE UNIVERSITY OF DELAWARE,
et al.,

Defendants.

Civil Action No. 74-58

ORDER

THIS 16th day of September, 1976, for the reasons stated in this Court's Opinion of September 14, 1976, defendants' motion to decertify this action as a class action is denied.

Walter K. Stapleton
United States District Judge

APPENDIX H.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

NOLVERT P. SCOTT, JR., individually
and on behalf of all other persons similarly
situated,

Plaintiff,

v.

THE UNIVERSITY OF DELAWARE,
et al.,

Defendants.

Civil Action No. 74-58

FINAL JUDGMENT

THIS 16th day of August, 1978, for the reasons stated in the Court's Opinion of this date,

Now, therefore, IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered for the defendants and against the plaintiff.

Walter K. Stapleton
United States District Judge

APPENDIX I.

UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2365

NOLVERT P. SCOTT, JR., etc.

vs.

THE UNIVERSITY OF DELAWARE, et al.

NOLVERT P. SCOTT, JR.,

Appellant

(D.C. Civil Action No. 74-0058)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: ADAMS, HUNTER and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on April 2, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court dated August 16, 1978, be, and the same is hereby affirmed as it pertains to Scott's individual disparate treatment claims; insofar as the

said judgment pertains to the class action, the said judgment be, and the same is hereby vacated, and the cause remanded with instructions that an order be entered decertifying the class action and dismissing without prejudice all of the class action aclaims asserted by Scott, thereby disposing of all claims presented in this action, all of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Illegible
Clerk

June 6, 1979

APPENDIX J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2365

NOLVERT P. SCOTT, JR., etc.

v.

THE UNIVERSITY OF DELAWARE, et al.

NOLVERT P. SCOTT, JR.,

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by

NOLVERT P. SCOTT, Plaintiff-Appellant

in the above entitled case having been submitte to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Illegible
Judge

Dated: July 3, 1979

APPENDIX K.

Rule 4. Appeal as of Right - When Taken.

(a) APPEALS IN CIVIL CASES. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court

may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Rule 10. The Record on Appeal.

(a) COMPOSITION OF THE RECORD ON APPEAL. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) THE TRANSCRIPT OF PROCEEDINGS; DUTY OF APPELLANT TO ORDER; NOTICE TO APPELLEE IF PARTIAL TRANSCRIPT IS ORDERED. Within 10 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be in-

cluded. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) STATEMENT OF THE EVIDENCE OF PROCEEDINGS WHEN NO REPORT WAS MADE OR WHEN THE TRANSCRIPT IS UNAVAILABLE. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the district court and shall then be certified to the court of appeals as the record on appeal and transmitted thereto by the clerk of the district court within the time provided by Rule 11. Copies of the agreed statement may be filed as the appendix required by Rule 30.

28 U.S.C.

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963.

42 U.S.C.

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.

§ 2000e - 2(a)

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (As amended)

Supreme Court, U. S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-406

THE ESTATE OF NOLVERT P. SCOTT, JR.,
Individually and on behalf of all
other persons similarly situated,

Petitioner,

v.

THE UNIVERSITY OF DELAWARE, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

POTTER ANDERSON & CORROON
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I. THE JUDGMENT AGAINST DR. SCOTT ON HIS INDIVIDUAL CLAIM WAS BASED UPON A REVIEW OF ALL THE EVIDENCE AND WAS PROPERLY AFFIRMED.

The petitioner has focused on a statement by the court of appeals that the district court found that Dr. Scott had failed to establish a prima facie case. Petitioner then argues that an erroneous standard of proof was employed. However, it is apparent that the court of appeals mis-spoke when it said that the district court concluded "that Scott had failed to establish a prima facie case" (A-74). Had the district court so concluded it would have been unnecessary for it to examine and analyze the evidence adduced by the University to rebut Dr. Scott's case. In fact, the district court made a careful and thorough investigation of the evidence presented by both sides and concluded on the totality of the evidence that Dr. Scott was not the victim of racial discrimination by the University and was treated no differently than non-black faculty members (A-50).

> "It is clear from the record that from September of 1971 until the time of his evaluation for contract renewal, Scott had undertaken very little in the way of research and had produced nothing by way of scholarly publication. Moreover, he had nothing of substance underway or planned at the time of the May, 1973 decision on renewal. These deficiencies weighed heavily against him in the minds of most of the Sociology faculty, (Finner, F-188, G-6; Brown, G-48; Eckhardt, G-76; Harlan, H-9; Dynes, H-24; McFarlane, DX-23, p. 14)." (A-41-42)

"During Scott's first year and the spring of his second, Chairman Scarpitti and other members of the faculty received numerous complaints from their advisees and other students of the kinds described in Scarpitti's letter. There was also a Student Government Association course evaluation in the fall of 1971, which rated Scott's 'Social Problems' course. (DX-18). In that student evaluation, only 29% of the class responded (35 of 120). 45.5% of those responding believed that the lectures contained mainly irrelevant materials. 55.9% believed that the course had not contributed to their growth or development. 70.5% felt Scott, as a teacher, was 'below average' or a 'bummer'. Finally, 81.2% said they would not recommend Scott as a professor." (A-42-43)

* * *

"47. Dr. Scarpitti testified that he received twelve to fifteen such complaints. (Scarpitti, F-133, F-62-66; see also DX-14). Similar complaints were received by other faculty members. (Brown, G-50; Eckhardt, G-77; Wenger, G-113; Harlan, H-8; McFarlane, DX-23, p. 14). There is also record evidence from students demonstrating dissatisfaction with his teaching performance. (Dykes, G-84). There is also evidence indicating that the enrollment in Scott's 'American Minorities' course fell from 85 to 5 over the three years Scott taught at the University. (Scarpitti, F-90)." (A-42, footnote 47).

* * *

"The ultimate decision to be made in any racial discrimination case where the plaintiff makes a claim of disparate treatment is whether it is reasonable to infer from all the evidence that the challenged action was based in whole or in part upon race." (A-44)

"Based on all the evidence, I conclude that the failure of the University to renew Scott's contract resulted from the opinion of nine members of the Sociology Department that he was not, and would not develop into an acceptable permanent professional colleague. This opinion was based primarily on what they considered to be a demonstrated lack of interest in pursuing the kind of scholarship, research and writing which they thought to be significant, and secondarily, on the view that one with the teaching experience which Scott had should have developed greater effectiveness in relating with students. (A-45-46)

Quite clearly the University's articulation of legitimate, non-discriminatory reasons for the decision not to renew Dr. Scott's contract meets the standards set out in *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978) and *Board of Trustees of Keene State College v. Sweeney*, ___ U.S. ___, 99 S.Ct. 295, 58 L.Ed. 2d 216 (1978)..

The court of appeals held that the evidence supported the district court's findings of fact and that these findings were not clearly erroneous. It therefore affirmed the judgment against Dr. Scott on his individual claims. (A-75-76). Clearly, it was correct in doing so and petitioner's argument about an erroneous standard of proof for establishing a prima facie case is irrelevant.

II. THE PLAINTIFF'S CLASS WAS ILLUSORY

At the time of trial there were 27 past or present black faculty members. (A-30) Three of these testified for plaintiff but none of the three claimed to have been dis-

criminated against by the University and none of the three claimed that any other black faculty member or prospective black faculty member had ever been discriminated against by the University. It should be apparent that Dr. Scott's claim was never typical of the claims of past and present faculty members when none of them felt aggrieved. The district court summed up the evidence concerning black faculty members:

> "Finally, with respect to renewals, there is no evidence of any black faculty member other than Dr. Scott who has not had his contract renewed. Indeed, no faculty member other than Dr. Scott is identified in the record as one claiming to be a victim of any racial discrimination in renewal, promotion or tenure at the University." (A-66)

Between 1972 and time of trial fifty-five blacks were known to be involved as candidates for faculty positions (A-61). Sixteen blacks were hired (A-30) and offers were made to other blacks who declined (A-31-33). No unsuccessful black candidate for faculty employment ever claimed that he had been discriminated against in recruitment or hiring. The district court referred to this as a "significant gap" in plaintiff's evidence, saying:

> "Despite the voluminous testimony in this case, not one individual has been identified who claims to have been discriminated against in the hiring process on grounds of race, and, as earlier indicated, at least one of plaintiff's witnesses familiar with the University scene over a substantial period of time testified that he knew of no black who had been interested in employment with the University and who had been unfairly denied a job opportunity."

It should be apparent that Dr. Scott's claim was never typical of the claims of unsuccessful black applicants for faculty employment because (1) there was no showing that any member of the class felt aggrieved, and (2) Dr. Scott was recruited and hired by the University at a substantially higher salary than it paid comparable white candidates (A-25).

Furthermore, Dr. Scott never satisfied the numerosity requirement of Rule 23. The court of appeals so held with respect to past and present faculty members (A-88). It recognized the University's contention that the applicant class was merely hypothetical and that the numerosity requirement was unsatisfied (A-82) but never reached this contention because of its holding that Dr. Scott's claims were not typical of the applicant class (A-84).

Neither the district court nor the court of appeals addressed the University's threshold contention that courts should not concern themselves with class action litigation when there is no showing of the existence of a class of persons who feel aggrieved and need representation. Compare *White v. Gates Rubber Company*, 53 F.R.D. 412, 415 (D.Col. 1971) where the court held that a class will not be certified until there is a showing "that there is, in fact, a class needing representation."; and *Tolbert v. Western Electric Company*, 56 F.R.D. 108, 114 (N.D.Ga. 1972) where the court said: "The court cannot allow a class action where there is no class, even in a Title VII case . . ."

If the petition for certiorari were to be granted and this case remanded, the courts below would have to confront a class action where there is no class in need of representation and the typicality and numerosity requirements of Rule 23 cannot be satisfied.

Furthermore, it should be apparent that this case is

not the vehicle for a clarification of *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed. 2d 543 (1977) as urged by petitioner, if, in fact, any clarification is required.

> "As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."
>
> * * *
>
> "The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *East Texas Motor Freight v. Rodriguez*, 431 U.S. at 403 and 405-406.

Where, as here, there was no showing that any class member ever complained that he had suffered an injury or had been the victim of discrimination, there was nothing with which to compare the plaintiff in order to ascertain whether he had suffered the same injury as the class members. Unlike most Title VII class actions, in this case not a single institutionalized discriminatory employment practice was shown by Dr. Scott, unless the requirement of a Ph.D. or its equivalent fell into that category[1]; and as to that the court of appeals properly held that Dr. Scott was not an adequate representative because he possessed such degree.

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[1]Contra, *Townsend v. Nassau County Medical Center*, 558 F.2d 117 (2d Cir. 1977), cert. den., 434 U.S. 1015 (1978).

III. NO CROSS-APPEAL WAS REQUIRED BECAUSE APPELLEE DID NOT ATTACK THE JUDGMENT

The petitioner claims the Scott decision is in direct conflict with *Joseph v. Norman's Health Club, Inc.*, 532 F.2d 86, 88 ftn. 2 (8th Cir. 1976). In fact, both decisions are consistent with established doctrine and there is no need for this court to speak further to such principles. The Scott decision is supported by the "inveterate and certain" rule that an appellee may, without filing a cross-appeal, "urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it"[2]; and the *Norman's Health Club* decision is supported by the corollary of the rule that "what (an appellee) may not do in the absence of a cross-appeal is to attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . ."[3]

---

[2]Morley Construction Company v. Maryland Casualty Company, 300 U.S. 185, 191 (1937), *quoting* United States v. American Ry. Express Company, 265 U.S. 425, 435 (1924). *See also* Dandridge v. Williams, 397 U.S. 471, 475-76 n. 6 (1970).

[3]Morley Construction Company, supra, 300 U.S. at 191, quoting American Ry. Express Company, supra, 265 U.S. at 435.

In *Scott* the majority of the court of appeals recognized that in challenging the class certification the University did not seek to enlarge its own rights or lessen those of its adversary.[4] As the concurring opinion pointed out, the University was the prevailing party on the merits of the class action and would have preferred not to have the judgment in its favor disturbed; it raised the class action certification issue merely to preserve a back-up ground for protecting the judgment in its favor[5] (A-93).

In the *Norman's Health Club* decision, on the other hand, the appellee's challenge to the class action certification would have lessened the rights of its adversary. The defendants were Norman's Health Club, Inc. and two finance companies to which the Club assigned promissory notes signed by plaintiffs. In the district court there was a judgment in favor of the class against the Club, but a judgment against the plaintiffs in favor of the finance companies.

The plaintiffs appealed the judgment in favor of the finance companies and no cross-appeals were filed by the Club or the finance companies. On appeal, one of the finance companies sought to challenge the class certification but the district court refused to reach the question because no cross-appeal had been filed, saying that the appellee could not attack a judgment to enlarge his rights or lessen the rights of his adversary unless he filed a cross-appeal. Although appellee's rights would not have

---

[4]"Since the University prevailed upon the merits of the class claims in the district court, its attack upon the class certification on appeal will not enlarge its own rights or lessen those of its adversary." (A-77, ftn. 12)

[5]To the extent that appellee's raising the class certification issue results in an alteration of the judgment, the rights of the appellee are lessened rather than enlarged because it loses the res judicata effect on the class.

been enlarged, the right of plaintiffs would have been lessened because they would have lost the judgment in favor of the class against the Club if the class had been decertified.

Although it determined that the class action certification was reviewable, the majority of the court of appeals chose, inexplicably, not to rest its decision concerning reviewability on doctrine long settled by the opinions of this court, even though it recognized that the University did not seek to enlarge its own rights or lessen those of its adversary (A-77-79). The concurring opinion found this "somewhat troublesome" because in its view there was no need for the University to file a cross-appeal in order to preserve a back-up ground for protecting a judgment in its favor when an appeal had already been filed from that judgment (A-92-93).

We, too, found the majority's analysis "somewhat troublesome" because of its implicit criticism of our appellate procedures which we thought were based upon settled doctrine. Nevertheless, the majority reached the proper end result and it would serve no useful purpose in this case to remand a legally correct result for a modification of the reasoning which led to such result.

CONCLUSION

For the foregoing reasons this court should deny the petition for certiorari to review the judgment of the court of appeals.

Respectfully submitted,

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JOHN P. SINCLAIR
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P.O. Box 951
Wilmington, DE 19899
Attorney for Respondents,
University of Delaware, et al.

Dated: Oct. 3, 1979

AFFIDAVIT OF MAILING

STATE OF DELAWARE

COUNTY OF NEW CASTLE

SS.

BE IT REMEMBERED that on this 3rd day of October, 1979, before me, the Subscriber, a Notary Public for the State and County aforesaid, personally appeared Therese M. Hogan, who, being duly sworn according to law, did depose and say that she mailed today, by regular mail, postage prepaid, three copies of the within BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the following attorneys:

John S. Grady, Esquire
Thomas Stephen Neuberger, Esquire
Bader, Dorsey & Kreshtool
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New York, NY 10019

SWORN TO AND SUBSCRIBED before me the day and year aforesaid.